Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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81-1135

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1981

OMA H. HESTER, JR.,
Petitioner

v.

MARTINDALE-HUBBELL, INC., AMERICAN BAR ASSOCIATION; AND NORTH CAROLINA STATE BAR,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Noel Lee Allen
Frank M. Parker, Jr.
BARRINGER, ALLEN & PINNIX
P.O. Drawer 1270
Raleigh, NC 27602
Tele: (919) 755-0505

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QUESTIONS PRESENTED

(I) Prohibiting its member attorneys from advertising in any law list not deemed "reputable", the North Carolina State Bar has nevertheless approved advertising in any law list "certified" by the American Bar Association (ABA). The ABA "certifies" a law list upon approval of its publisher's listing and rating procedures. Martindale-Hubbell maintains the only general legal directory so "certified" by the ABA, yet Martindale's listing procedures discriminate against some attorneys and are in restraint of trade. Could a jury be permitted to conclude that the ABA's approval and certification of Martindale's discriminatory policies, combined with the State Bar's restrictions on the advertising opportunities available to its members

and Martindale's domination of the general legal advertising market, resulted in a combination or conspiracy within the meaning of Section 1 of the Sherman Act?

(II) Robert I. de Shebernin's affidavit is the only evidence tendered by Martindale or the ABA to refute allegations of concerted conduct. The affiant was not an officer of Martindale prior this suit and did not participate in establishing the advertising policies. Is the affiants' bare denial of concerted activity sufficient to warrant summary judgment in this antitrust case?

(III) Martindale- Hubbell is the only general legal directory in the nation and the only law list of any kind that publishes ratings of listed lawyers. Its restrictive advertising policies

result in a restraint of trade. Among other things, Martindale enforces a tying arrangement, a discriminatory advertising policy and restriction of its resale market. Should a jury be permitted to conclude that Martindale's market position and conduct resulted in an unlawful monopoly under Section 2 of the Sherman Act?

(IV) North Carolina General Statute 75-1.1 closely parallels Section 5 of the Federal Trade Commission Act. The North Carolina Supreme Court and the United States Supreme Court have held these respective acts to be broader in scope than Sections 1 and 2 of the Sherman Act. Did the Court of Appeals err in affirming summary judgment against Hester's North Carolina General Statutes 75-1.1 claim solely on

the basis that Hester's case failed to show a violation of Sections 1 and 2 of the Sherman Act?

PARTIES TO THE PROCEEDING

As indicated in the caption to this case, the parties to this proceeding are Oma H. Hester, Jr., Petitioner, and Martindale-Hubbell, Inc.; the American Bar Association; and the North Carolina State Bar, Respondents

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals, reproduced in the Appendix hereto (App. p. 112), is reported at 659 F.2d 433 (4th Cir. 1981). The opinion of the District Court, also reproduced in the Appendix (App. p. 75) is at 493 F. Supp 335 (E.O.N.C. 1980). The report and recommendations of the federal

magistrate are not officially reported; they are reproduced in the Appendix (App. p. 1)

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on 16 September 1981. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. Section 1 - -

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal;

15 U.S.C. Section 2 - -

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . ..

15. U.S.C. Section 15 - -

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. Section 26 - -

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . ..

N.C.G.S. 75-1 - -

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars.

N.C.G.S. 75.1.1 - -

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) The purpose of this section is to declare, and to provide civil legal means to maintain ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.U.S. Const. Amend. 14 Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sttes and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Const. Art. 1 Section 19

Sec. 19. Law of the land; equal protection of the laws. No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws: nor shall any person be subjected to discrimination by

the State because of race, color, religion, or national orgin.

STATEMENT OF THE CASE

This litigation arose out of the refusal by Respondent Martindale-Hubbell Inc. (Martindale) to publish Petitioner Oma Hester's "professional card" in the biographical section of Martindale's legal directory.

Petitioner Hester is an attorney and member of the North Carolina State Bar. At the time the actions that are the subject of this suit took place, Disciplinary Rule 2-102(A), promulgated by the State Bar, prohibited North Carolina attorneys from advertising in a law list or directory unless the list or directory was "reputable". The Rule further provided that any law list "certified" by the Respondent American

Bar Association (ABA) was "conclusively established to be reputable".

For almost forty years prior to February 1978, the ABA through its Standing Committee on Law Lists issued rules and standards with which law list publishers could comply and thereby be "certified". Rule and Standard 3 of the Committee, promulgated in 1943, prohibited the giving of "preferential prominence. . . to the name of any listed attorney or attorneys, by different size and character of type". Rule and Standard 4 provided that a publisher of a law list certified by the Committee may rate its listees "in a manner not disapproved of by the Committee". Finally, Informal Opinion 55, issued by the ABA's Committe on Ethics, permitted attorneys to

respond to questions asked by a law list publisher in the course of rating other attorneys.

Martindale sought and received ABA approval and certification of its listing and rating practices from the very beginning of the Law List Committee's regulatory activities. Committee members regularly visited Martindale's offices to inspect the operation of the publisher's rating system. On at least one occasion, Martindale's vice-president attended the Committee's annual meeting. As a result of Martindale's successful efforts in collaborating with the Committe and complying with its standards and directives, Martindale's legal directory has each year received a certificate of compliance from the Committee as one of

sixty law lists certified to be "reputable". It was, however, the only one listed in the category of "general legal directory". Indeed, Martindale's directory is the only general legal directory in the nation and the only law list of any kind that publishes ratings of its attorney listees.

Martindale's directory has traditionally included two sections. In the geographical section, Martindale lists without charge the name of every lawyer and firm in the United States, along with such information as years of birth and admission to the bar, college, and law school attended, and professional affiliation. In the biographical section, on the other hand, Martindale publishes for a fee the "professional card" listings of certain attorneys and

firms. The "professional card" advertisements are printed in boldface and include such information as an attorney's legal publications, membership in professional associations, awards and distinctions, predominant areas of practice, and references and representative clients. In order to subscribe to the publication of a "professional card" in the biographical section, however, an attorney must have received a certain rating under Martindale's rating system or be associated with a firm that has attained the rating.

In 1973, Petitioner Hester wrote to Martindale seeking the publication of his "professional card" in the 1974 Martindale directory. Hester was subsequently told by Martindale that he

had not yet received a rating and was therefore ineligible to advertise in the biographical section. Hester then formally complained both to the State Bar and to the ABA, alleging that Martindale's restrictive advertising policies violated DR2-102(A)(6). Respondent State Bar advised Hester that since the ABA has certified Martindale's listing procedures as "reputable", Hester's quarrel was with the ABA. Respondent ABA advised Hester through its Committee on Law Lists that Martindale's policies were fully in compliance with Committee rules and standards. Hester then filed the present action.

In the first count of his complaint, Hester alleged that, by certifying Martindale's restrictive

listing policies as "reputable", and by effectively sanctioning Martindale's refusal to publish Hester's "professional card", the ABA combined with the State Bar and Martindale to promote Martindale's discriminatory advertising practices in violation of Section 1 of the Sherman Act. In the second count, Hester alleged that Martindale had monopolized or attempted to monopolize the market for advertising in general legal directories in violation of Section 2 of the Sherman Act. Counts three and four of the complaint incorporated by reference the allegations of concerted anticompetitive activity and alleged further violations of N. C. Gen. Stat, Sections 75-1 and 75-1.1. Counts five and six of the complaint alleged that the State Bar, by

declining to consider the validity of Hester's complaint against Martindale, had violated Hester's constitutional rights to due process and equal protection. Counts five and six prayed for injunctive and declaratory relief. After some discovery was had, Respondents Martindale and the State Bar moved for summary judgment. Although the district court magistrate had recommended denial of the motions (See App. p. 1), and although Respondent ABA was not even a party to the motions, the district court granted summary judgment and simultaneously dismissed sua sponte the claims against the ABA.

The district court's opinion (See App. p. 81) concluded that Hester could not succeed on his Sherman Act Section 1 theory because he had failed to present

sufficient evidence of concerted action among the Respondents. Concerning Hester's Section 2 claim, the district court further concluded that Martindale had not unlawfully attained or maintained any monopoly position it might have acquired. (App. p. 99) Having found no evidence showing concerted activity in restraint of trade, the district court also rejected Hester's claims under N. C. Gen. Stat. Sections 75-1 and 75-1.1. Finally, the court rejected Hester's constitutional claims on the ground that the necessity for declaratory or injunctive relief had been mooted by DR2-102 (A)(6)'s amendment to omit any reference to ABA certification.[2] (App. p.106)

On appeal to the Fourth Circuit pursuant to Rule 4 (a) of the Federal Rules of Appellate Procedure, the district court's decision was affirmed. Writing for the majority, Judge Phillips adopted the reasoning and the disposition of the case by the district court in all respects save one. Specifically, the district court had purported to rely upon this Court's decision in Albrecht v. Herald Co., 390 U.S. 145 (1968), and on the Third Circuit's later interpretation of Albrecht in Harold Friedman, Inc. v. Kroger Co., 581 F.2d

1068 (3rd Cir. 1978), to find no evidence in Petitioner's case of the concerted activity requisite to establish a violation of Section 1 of the Sherman Act. (See App. p. 81) While agreeing with the district court that the record on summary judgment failed to show concerted activity, Judge Phillips' opinion found both the Albrecht and Friedman cases to be inapposite. Instead, said the Fourth Circuit, there is in the present case "clearly a restraint of trade in the form of restricted access to advertising", and the only dispositive question is "whether that restraint was the result of the concerted activity of the ABA, the State Bar, and Martindale-Hubbell or merely the unilateral action of Martindale-Hubbell". (App. p. 112)

(Emphasis added). Finding no showing in the record "that the ABA required, or even suggested" that Martindale follow restrictive advertising policies, Judge Phillips concluded that the evidence "simply does not show a concerted refusal to deal. . . ." (App. p. 112)

In a vigorous dissent, Chief Judge Winter concluded otherwise. (App. p. 130) Believing that the Fourth Circuit majority erred in "applying a definition of 'concerted activity' considerably narrower than that approved" by this Court in the Albrecht case (App. p. 130), Judge Winter noted that for all practical purposes, "approval by the ABA of the Martindale-Hubbell scheme was necessary to the very existence of the publication". (App. p. 138) In the dissent's view, the yearly certification

of Martindale materially aided the publisher "in pursuing a policy with known anticompetitive effects" (App. p. 140); the result was "a constraint considerably more effective than either [party] could have created on its own" - a "classic example" of the sort of "symbiotic relationship" prohibited under Section 1 of the Sherman Act. (App. p. 141)

Judge Winter thus would have found error in the district court's granting of summary judgment on Hester's Section 1 and related state law claims.

REASONS FOR GRANTING THE WRIT

(1) THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT REGARDING SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act prohibits any "contract, combination,

or conspiracy in restraint of trade." 15 U.S.C. Section 1 (Emphasis added). It is well settled by decisions of this Court that the collaboration prerequisite to Section 1 liability need not be shown by direct evidence of explicit agreement, but may be inferred from a course of dealing or pattern of activity which in its totality required the collective cooperation of two or more actors. See, e.g., Albrecht v. Herald Col, 390 U.S. 145 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

In the case below, the Fourth Circuit affirmed summary judgment against Petitioner Hester's Section 1 claims on the ground that, in the absence of evidence establishing that the ABA "required" or "suggested" that

Martindale discriminate in its advertising policies, there could be no showing of the concerted activity triggering Section 1's prohibition. In so holding, the Fourth Circuit applied an analysis considerably at variance with this court's approach in Albrecht and Parke, Davis, supra.

In Albrecht, a Section 1 collective was found where two parties, each aware of the anticompetitive effects of the newspaper publisher's pricing policy, "materially aided in the accomplishment" of the publisher's plan. 390 U.S. at 150. In the Parke, Davis case, an illegal collaboration was found in the mere acquiescence by retailers in adhering, under threat of termination, to the resale prices fixed by their supplier. 362 U.S. at 45. In neither

of these cases did the third party actors, found to be part of a Section 1 combination or conspiracy, "require" or "suggest" the anticompetitive activity complained of. As in Albrecht or in Parke, Davis, the ABA's regular certification of Martindale's restrictive policies in the present case provided the necessary impetus for the continuation of Martindale's practices.

The opinion below would apparently require a showing that the ABA have somehow initiated the restraint employed by Martindale before a Section 1 combination could be found. In fact, however, the source of Martindale's advertising restrictions is not a controlling factor. Considered in the abstract, one publisher's unilateral policy of allowing some competitors to

advertise but not others effects no real restraint of trade, simply because those excluded are free to go elsewhere. But when forces extraneous to the market combine to elect the publisher as the dominant, indeed the sole, supplier of an essential form of advertising, a very different picture is presented. In the instant case, the State Bar has warned its members to advertise only in "reputable" law lists, such as those approved and certified by the ABA; Martindale provides the only law list of its kind so certified. Thus, even under a view of concerted activity far less expansive then that taken in Albrecht or Parke, Davis, supra, the fact finder could well infer a Section 1 pattern from the combined effect of the State Bar's control of

advertising, the ABA certification program, and Martindale's discriminatory policies. It is the anticompetitive system that Section 1 condemns, not the often innocent actions which make up its component parts. That much is clear from this Court's decisions in United States v. Container Corporation, 393 U.S. 333 (1969), and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

The Container Corporation defendants, dominant sellers in the corrugated container market, did no more then regularly exchange price information. Though a specific agreement to fix prices was absent, this Court nevertheless discerned a pattern of joint activity which resulted in forbidden price stabilization:

> Here all that was present was a request by each defendant of its competitor for information . . . Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it. That concerted action is of course sufficient to establish the combination or conspiracy, the essential ingredient of a violation of Section 1 of the Sherman Act.

393 U.S. at 335 (Emphasis added). The information exchange system in Container Corporation fell within the Section 1 ban not because the

arrangement itself was invidious, but rather because the result of the system tended to interfere with competition. In like manner, Martindale's successful collaboration with the ABA, coupled with the State Bar/ABA designation of Martindale as the sole source of general advertising open to State Bar members,* has engendered a system which guarantees that Martindale's discrimination will work a restraint on trade.

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* As Chief Judge Winter put it in his dissent below, "[f]or all practical purposes. . . . ABA certification was the only route to "reputability" before the 1978 amendments to DR2-102(A)(6), because a lawyer publishing in a non-certified list would take the chance of its later being found not "reputable". (App. p. 138)

More on point is this Court's opinion in Goldfarb, supra. In that case a "suggested" minimum fee schedule adopted by the County Bar was easily identified as a Section 1 restraint on trade, when considered in light of State Bar warnings to attorneys not to deviate from their county bar schedules. To the suggestion that the local fee schedule was merely advisory, Chief Justice Burger responded:

> Here a fixed, rigid price floor arose from respondents' activities. . . The fee schedule was enforced through the prospective professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms. This is not merely the case of an agreement which may be inferred from an exchange of price information [as in] United States v. Container Corp. . . .for here a naked agreement was clearly shown...

421 U.S. at 781-82 (Emphasis added).

Though the County Bar, not the State Bar, had promulgated the fee schedule, the State Bar's ethical opinions had made it clear that an attorney's habitual failure to comply with the schedule could lead to disciplinary action. "These factors combined to create a pricing system that consumers could not realistically escape." Id. at 783.

A similar network of compulsion and resulting restraint is evident in the instant case, where the State Bar warns its members to advertise only in "reputable" law lists, the ABA advises that the Martindale listing - the only one of its kind - is "reputable", and Martindale, with the approval of the ABA, rates some attorneys, but not others, worthy of special advertising opportunities. These factors coalesced to define a limited advertising market

that the consumers, those attorneys desiring the competitive advantage of general advertising, could not realistically escape.

The rationale employed in Goldfarb supra, and in similar cases provide yet another avenue to the finding of concerted action in the present case. Chief Justice Burger noted in Goldfarb that the State Bar, by providing that deviation from local fee schedules could result in disciplinary action, had "voluntarily joined in what is essentially a private anticompetitive activity". 421 U.S. at 791-92. As in Goldfarb, this Court has on other occasions found a Section 1 combination in the concerted action of a professional association and its members. See, e.g., National Society

of Professional Engineers v. United States, 435 U.S. 679 (1978); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Associated Press v. United States, 326 U.S. 1 (1945).

In the National Society case, the United States alleged a Section 1 combination in that the Society's members had agreed to abide by the Society's canons of ethics prohibiting competitive bidding. 435 U.S. at 684. This Court agreed, noting that evidence of the agreement could be found in the Society's Code of Ethics. Id. at 682-83.

In Silver the plaintiffs, not members of the Stock Exchange, were excluded from wire service connections with member firms pursuant to an Exchange ruling. This Court

characterized the Exchange's discontinuance of the wire service as "a group boycott depriving the [plaintiffs] of a valuable business service they needed in order to compete effectively..." 373 U.S. at 341. For Sherman Act purposes, it made no difference that the Exchange's action was "collective" only in the sense that its members agreed to abide by its rulings:

> The fact that the consensus underlying the collective action was arrived at when the members bound themselves to comply with Exchange directives upon being admitted to membership rather than when the specific issue of Silver's qualifications arose does not diminish the collective nature of the action. A blanket subscription to possible future restraints does not excuse the restraints when they occur.

Id. at 348 n.5.

Finally, in the Associated Press case, supra, this Court held that where the effect of AP by-laws were to bar the admission to the Association of a new applicant upon the objection of an Association member competing in the same field, the by-laws constituted on their face an agreement in restraint of trade.

The decisions of this Court in Goldfarb, National Society, Silver, and Associated Press leave no doubt that concerted action for Section 1 purposes may be found where the members of an association agree or assent to a collective course of conduct which restrains trade. And the Albrecht and Parke, Davis decisions make it clear that either active participation or passive acquiescence in another's conduct in restraint of trade may forge

a Sherman Act combination, at least where the participation or acquiescence is essential to the success or very existence of the conduct itself. Applied to the present case, these precedents would seem to require that a jury be allowed to consider whether Martindale's discriminatory marketing of a resource necessary to effective competition has been facilitated by the combined effect of the State Bar's regulation of its members and the ABA's supervision and approval of Martindale's listing and rating procedures. Despite these precedents, however, the Fourth Circuit ruled below that Petitioner's case lay so far "beyond even the most liberal extension of the concept of concerted activity" (App. p. 112) that

his suit must fail under Respondents' motions for summary judgment.

Both in its analysis and in its conclusions, the opinion of the Fourth Circuit in the instant case so conflicts with the decisions of this Court as to justify the grant of certiorari to review the decision below.

(II) THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING QUESTIONS CONCERNING THE ANTITRUST IMPLICATIONS OF PROFESSIONAL "CERTIFICATTION" PROGRAMS

Deeming this Court's decision in Albrecht v. Herald Co., 390 U.S. 145 (1968), "inapposite" to the facts of the present case the Fourth Circuit affirmed summary judgment against Petitioner's Sherman Act Section 1 claims on the ground that restraint of trade resulted merely from "the unilateral action of Martindale-Hubbell". (App. p. 112). In so holding, the court below apparently deemed insignificant the fact

that, as the dissent put it, "approval by the ABA of the Martindale-Hubbell scheme was necessary to the very existence of the publication".(App.p.) Winter, J., dissenting; See also App. p. 175).

The question of concerted activity raised by the facts and the holding in the case below is of far greater importance than the Petitoner's individual quarrel with Respondents. Stated in the abstract, the questiion becomes:

> **Where the monitoring and "certification" by an association of a business entity's practices is necessary to maintain that entity's market, does association certification and approval of, and acquiescense in, the entity's practices which restrain trade engender a Sherman Act "combination" in restraint of trade?**

Thus stated, the question is one of recurring importance both to the numerous professional associations which regulate the activities of their members through codes of ethics and advisory opinions, and to the many trade associations which establish and promote industry-wide standards through certification programs. Where, through "certification" or otherwise, an association guarantees to its members or to the general public that a particular product or service is tradeworthy, it thereby enhances the competitive advantage of the business marketing the approved product or service. When the certification procedure entails association approval or at least recognition of anticompetitive marketing practices employed by a business seeking

endorsement for its product or service, does the certification of that business engender a combination in restrain of trade? Given that an association may not refuse for anticomptitive reasons to certify a product, see, e.g., Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co., and that an association's role in the setting of standards must not effect a restraint on trade, see, e.g., Eliason Corp. v. National Sanitation Foundation, 614 F.2d 126 (th Cir.), cert. denied, 101 S. Ct. 89 (1980); Structural Laminates, Inc. v. Douglas Fir Plywood Association, 261 F. Supp. 154 (.Or. 1966), affirmed per curium, 399 F.2d 1555 (9th Cir. 1968), cert. denied, 3393 U.S. 1024 (1969), to what degree must antitrust considerations enter into an

association's decision to grant certification? When the restraint of trade tacitly supported by association certification inhibits competition among some members of the association itself, to the advantage of others, to what degree does the motive or intent of the certifying agency become relevant?

Allowance of the writ of certiorari to review the case below would allow this Court to give some needed guidance on these important questions.

(III) THE COURTS BELOW APPLIED A STANDARD FOR SUMMARY JUDGMENT IS IN CONFLICT WITH THE HOLDINGS OF THIS COURT

The only allegations supportive of Martindale's motion for summary judgment on Hester's claim of antitrust concert or combination derive from one paragraph in an affidavit by Robert I. de

Sherbinin. The affidavit shows on its face that de Sherbinin was not an officer of Martindale until after Hester filed his action, and that he did not participate in the development of Martindale's advertising policies. Nevertheless, despite Rule 56(e)'s admonition that an affidavit in support of a summary judgment motion "shall show affirmitively that the affiant is competent to testify to the matters stated therein," the courts below allowed Martindale's motion for summary judgment to be triggered by the statement in the de Sherbinin affidavit that Martindale "has not acted in combination, conspiracy, or concert nor under any agreement or understanding with the American Bar Association. . ." (App. p. 177)

Even if the de Sherbinin affidavit were sufficient to support Martindale's burden under Rule 56(c) to show initially the absence of a genuine issue as to concert or conspiracy, Hester's proffer of evidence in opposition to the summary judgment motion should have precluded the trial court's disposition of the case at the summary judgment level. The record amply supports Judge Winter's conclusion that "[d]rawing inferences governable to Hester, a jury might find a illegal agreement":

> "There was certainly ample opportunity for conspiracy during the parties' forty-year course of dealing. The ABA regularly dispatched representatives to Martindale-Hubbell's to inspect the operation of its rating system. The record discloses at least one instance where a Martindale-Hubbell vice president attended the annual meeting of the Standing Committee on Law Lists. In addition, one could conclude that the ABA had a motive to promote the restraint alleged, since it favors the very practitioners who hold most

> positions of power and influence in the ABA. In this regard, it is worth noting that all members of the Standing Committee at the time Hester first complained of Martindale-Hubbell's policies were Lawyers whose names appeared in the Biographical section of the directory." (App. p. 142); Winter, J., dissenting)

It is well established that on motion for summary judgment, the inferences to be drawn from the underlying facts contained in the parties' forecast of the evidence must be viewed in the light most favorable to the party opposing the motion. See United States v. Diebold, Inc., 369 U.S. 654 (1962). As Judge Winter pointed out, the inferences favorable to Hester which can be drawn from the facts in the summary judgment record clearly

support a conclusion of concert of conspiracy in violation of the Sherman Act - a conclusion directly controverting Martindale's assection that no such combination existed. This presented a genuine issue for trial.

The trial court's ruling, and the Court of Appeals' affirmance, of summary judgment for Martindale failed to follow Diebold's instruction that inferences be drawn favorably to the non-movant. Moreover, the courts below ignored this Court's caution in Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969), that the application of summary judgment to antitrust claims is a procedure to be used sparingly.

(IV) SUMMARY JUDGMENT AGAINST HESTER'S CLAIMS UNDER SECTION 2 OF THE SHERMAN ACT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The District Court's conclusion, affirmed without discussion by the Court of Appeals, that Martindale had an innocent monopoly is in direct conflict with the holding of this Court. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) and United States v. United Shoe Machinery Corp., 110 F. Supp 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954), hold that it is not necessary that the conduct in furtherance of the monopoly be illegal under Section 1 of the Sherman Act.

The unrebutted evidence of record establishes that Martindale tyed the purchase of advertising in its biographical section to purchase of a subscription of the publication (App. 175) It imposed discriminatory policies between classes of consumers inasmuch as non-rated lawyers were allowed to advertise if they were members of an "av" or "bv" rated firm (App. 132) [Further, it restricted resale or other disposition of used volumes of its publication. See Martindale-Hubbell Law Directory (1974)]

A firm which holds a lawful monopoly by virtue of ownership of a unique resourse is guilty of monopolization of its exploits resource in ways which exclude or disadvantage customers arbitrarily or invidiously. Associated

Press v. United States, 326 U.S. 1, 655 Ct. 1416, 89 L.Ed. 2013 (1945). Tying in the sale of advertising in itself may be unlawful, and is an example of less than "honestly industrial" monopolistic practice. Kansas City Star Co. v. U.S. 240 F. 2d 643 (8th Cir. 1957).

Thus, even if Martindale's conduct were entirely unilateral, there is sufficient evidence in the light most favorable to Hester to necessitate denial of summary judgment.

(V) SUMMARY JUDGMENT AGAINST HESTER'S CLAIM UNDER NORTH CAROLINA GENERAL STATUTE 75-1.1 CONFLICTS WITH DECISIONS OF THIS COURT AND THE NORTH CAROLINA SUPREME COURT.

North Carolina General Statute 75-1.1 closely follows the language of Section 5 of the Federal Trade

Commission Act. The North Carolina Supreme Court has observed that the courts should look to Federal law interpreting the Federal Trade Commission Act for guidance in applying N. C. G. S. 75-1.1. Marshall v. Miller, 302 N.C. 539, 276 S.E. 2d 397 (1981). Both the state and federal enactments may thus be said to encompass more that those competitive acts and practices prohibitd under the Sherman Act. See, Fashion Originator Guild of America v. FTC, 312 U.S. 457 (1941). The Court of Appeals' decision to affirm summary judgment against Hester's claims under 75-1.1 simply because it has chosen to reject his claims under the Sherman Act is in conflict with the North Carolina Supreme Court's decision in Marshall v. Miller, supra.

CONCLUSION

The majority of the Court of Appeals erred by applying a narrow definition of "concerted activity" in direct conflict with the Supreme Court's holding in Albrecht, supra, In conflict with decisions of the Supreme Court, the majority below affirmed summary judgment based upon the sworn assertions of law and fact of an employee who was incompetent to testify to the matters in question and in the light of Hester's evidence to the contrary. (See, e.g. App. pp. 148, 152, 156, 159).

The lower decision is in conflict with the decision of the Supreme Court and other Circuits because it held Martindale to be an innocent monopolist, despite the fact it enforced tying

arrangements and discriminatory Practices (as well as resale restristions).

Finally, the Court of Appeals, is granting judgment against Hester's claims under N. C. G. S. 75-1.1, was in direct conflict with interpretations of that statute by the North Carolina Supreme Court, and analogously, by the United States Supreme Court.

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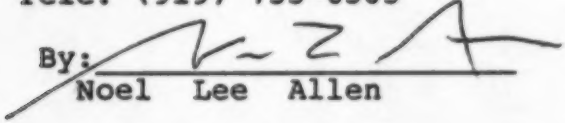
By: 
Noel Lee Allen

CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; and that I have served copies of the Petition for Certiorari and Appendix by deposition three copies of same to Counselors for the Respondents properly addressed to William F. Womble, Allan R. Gitter, Suite 2400, Wachovia Building, Post Office Drawer 84, Winston-Salem, N.C. 27102; H.D. Coley, Jr., Post Office Box 25850, Raleigh, N.C. 27611; John V. Hunter, III, P.O. Drawer 1191, Raleigh, N.C. 27602; and depositing same in the United States Post Office at Raleigh, North Carolina, with first class postage affixed.

This the 15th day of December, 1981.

Noel Lee Allen
Counsel for Petitioner

Appendix

81-1135

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1981

OMA H. HESTER, JR.,
Petitioner

v.

MARTINDALE-HUBBELL, INC., AMERICAN BAR ASSOCIATION; AND NORTH CAROLINA STATE BAR,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT COURT OF NORTH CAROLINA RALEIGH DIVISION

OMA H. HESTER, JR., Plaintiff	)	No. 76-0048-CIV-5
v.	)	MEMORANDUM AND RECOMMENDATION
MARTINDALE-HUBBELL, INC., AMERICAN BAR ASSOCIATION AND NORTH CAROLINA STATE BAR, Defendants	)	

This action is before the court upon the Motion for Summary Judgment filed by the defendant Martindale-Hubbell, Inc. ("Martindale"). Plaintiff has directed discovery requests to all three defendants and all have responded, and the file contains answers to interrogatories, admissions of fact, and various documents and exhibits. Together with the pleadings, they establish certain facts which are relevant to the motion.

The complaint alleges in the First and Second Counts claims against Martindale and the American Bar Association ("ABA") based on Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1, 2; the Third Count asserts a claim against Martindale and ABA under the North Carolina anti-trust statute, N.C.G.S., Section 75-1; the Fourth Count asserts a claim against the same defendants under N.C.G.S. Section 75-1.1 dealing with unfair methods of competition and unfair or deceptive acts or pratices in the conduct of any trade or commerce; the Fifth and Sixth Counts allege claims against the North Carolina State Bar under the Fourteenth Amendment of the United States Constitution and under Article I, Section 19 of the

Constitution of North Carolina, not now before us.

In the First Count of the complaint plaintiff alleges that Martindale-Hubbell, in combination and consipiracy with ABA, published, sold and distributed in foreign and interstate commerce the Martindale-Hubbell Law Directory in a form and manner which restrained trade and commerce in the sale and delivery of legal services by attorneys to members of the public among the several states, and which unlawfully discriminated against plaintiff with respect to Martindale-Hubbell's method of offering for sale to attorneys the publication in the directory of advertising or "professional card" listing space in the biographical section of the Martindale-Hubbell Law Directory, injuring

plaintiff in his professional employment, business and property, in violation of Section 1 of the Sherman Act (paragraph 9 of the Complaint).

Plaintiff further alleges in the First Count (paragraphs 10 through 20 of the complaint) that Martindale-Hubbell published and distributes its law directory annuyally, providing a unique and complete directory service for and about the legal profession. That Martindale-Hubbell solicits individual lawyers and law firms to purchase and publish advertising space ("professional cards") in its Martindale-Hubbell Law Directory ("directory). That Martindale's acceptance of attorneys' advertising cards for publication in the biographical section of the directory is subject to the regultaion of ABA and the

defendant North Carolina State Bar ("State Bar") by virtue of Canon 2 (DR 2-102) of the Code of Professional Responsibility promulgated by ABA and adopted by State Bar as an enforceable regulation governing the ethical conduct of lawyers licensed to practice within North Carolina, as set forth in appendix VII, Volume 4-A (1975 Cumulative Supplement) of the North Carolina General Statutes. That commencing in August, 1973 and continuing thereafter Martindale unlawfully refused to accept plaintiff's professional card for ppublication in the biographical section of the 1974 edition of the directory. That in December, 1973 plaintiff wrote a letter of complaint to the State Bar asserting that the management and contents of the directory were in

violation of Canon 2 of the Code of Professional Responsibility, and that State Bar refused to act on the merits of plaintiff's complaint. That at the same time plaintiff made the same complaint to ABA, which informed plaintiff that it had determined that the code had not been violated by Martindale's refusal to accept plaintiff's advertising card in the directory. That the unlawful conspiracy, combination and concerted action of Martindale and ABA prevented plaintiff from advertising in the directory the availability and nature of his professional legal services to the legal and related professions and to the general public, and that his right to publish advertisements of his legal services in Martindale's legal directory

was unlawfully restrained, and plaintiff was unlawfully discriminated against and placed at a competitive disadvantage with other lawyers in the same area. That due to those unlawful actions by Martindale and ABA plaintiff was and continues to be injured in the establishment of his law practice and the ethical advertisement of information relating to his professional qualifications and availability for employment.

In the Second Count (paragraphs 22 through 25 of the complaint) plaintiff realleges paragraphs 10 through 20 of the complaint and asserts a claim against Martindale and ABA under Section 2 of the Sherman Act, 15 U.S.C. Section 2. Plaintiff alleges that the directory is a unique, comprehensive and complete

directory of the legal profession, comprising the sole source of certain data and containing invaluable information and professional advertising by and about lawyers and the availability of legal services; that there exists no other directory remotely comparable to the directory in depth and comprehensiveness of coverage, scope of distribution, and use in the legal profession and related fields. That Martindale and ABA combined or conspired to monopolize the publication of a complete legal directory; that Martindale's refusal to publish plaintiff's advertisement left him with no alternative legal publication in which to advertise.

In the Third Count (paragraphs 26 through 29 of the complaint) plaintiff

alleges diversity of citizenship between him and Martindale and between him and ABA; he realleges paragraphs 10 through 20 of the complaint; and alleges that Martindale, in conspiracy, contract or concert with ABA, published the directory in trade or commerce in North Carolina in a manner which restrained trade of commerce within North Carolina in the sale and delivery of legal services to the public and unlawfully discriminated against plaintiff with respect to the sale to attorneys of advertising space in the directory, in violation of the North Carolina Statute prohibiting combinations in restraint of trade, 75 N.C.G.S. Section 75-1.

In the Fourth Count (paragraphs 30 through 33 of the complaint), plaintiff alleges diversity of citizenship between

him and these two defendnats, realleges paragraphs 10 through 20 of the complaint, and asserts a claim against them under North Carolina General Statute Section 75-1.1, prohibiting unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce within North Carolina. Plaintiff alleges that Martindale and ABA conspired to publish the directory in a manner which constituted unfair methods of competition and unfair or deceptive acts or practices in the sale of advertising to attorneys within North Carolina and making available to interested persons and the general public in North Carolina information regarding legal services available form attorneys, and that in particular they discriminated against

plaintiff with respect to the sale of advertising in the directory.

The defendant North Carolina State Bar is not involved in the motion for summary judgment now being considered. Its motion for summary judgment was considered earlier, and this court filed an opinion recommending that its motion be denied. That recommendation is now pending before the district judge.

The facts established by the pleadings and discovery, as mentioned at the outset, may now be summarized. The ethical conduct of lawyers in North Carolina is governed by Canons of the code of Professional Responsibility promulgated by teh North Carolina State Bar and set forth in Volume 4A of the North Carolina General Statutes, Appendix VII (1975 Cumulative

Supplement). Canon 2 (DR2-102) of the Code contains the regulation governing advertising by lawyers within North Carolina in law lists (such as the directory or otherwise, Paragraph (6) of that Canon provides in part as follows

> "A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards."

The Canon allows a limited amount of biographical and other informative information to be published in the biographical section. That Canon is coomped from the corresponding ABA Canon. ABA has a Standing Committee on

Law Lists which examines law lists to determine whether a particular law list is "reputable." The Canon specifies that a law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. The ABA has certified law lists publishers and their directories for forty years or more. Martindale's directory is the only general legal directory certified by ABA, and it has been so certified for that period of time.

As shown by the affidavit of Robert I. deSherbinin, Martindale's vice-president, Martindale undertakes to list every lawyer and law firm in the country in its directory without charge, including a limited amount of biographical and professional

information. Martindale also endeavors to include in those entries in the geographical section ratings of legal ability of lawyers. Martindale determines the ratings based upon confidential inquiries directed to other lawyers and judges in the place or area where the lawyer practices. Martindale also publishes ratings for law firms. Martindale does not conduct an investigation of the legal ability of firms; the rating given to a firm depends upon the lawyer composition of the firm and their ratings. Martindale does not publish ratings for all lawyers, since it is impossible for them to obtain information regarding all lawyers, and it so states in its directory. The three ratings of legal ability given in the directory are

"a" for very high; "b" for high; and "c" for fair. Martindale publishes no rating of legal ability for a lawyer unless the recommendations concerning him entitle him to a general recommendation of "v" (very high), embracing faithful adherence to ethical standards, professional reliability and diligence.

The history of plaintiff's efforts to persuade Martindale to accept his professional card for publication as advertising in the biographical section of the directory are shown in Martindale's two affidavits (deSherbinin and Hildebrand; by discovery conducted by plaintiff; and by the pleadings. Plaintiff began requesting Martindale to publish his advertising card in the directory's biographical section in

August, 1973 for publication in the 1974 directory, and continued his requests by letters and telepone calls without success for a period of three years prior to the commencement of this suit. In every instance Martindale declined to publish plaintiff's card in the directory at all, giving as its reason its requirement that the lawyer must have an "av" or a "bv" rating in order to publish a card in the biographical setion, and that the layers and judges whom Martindale solicited for recommendations concerning plaintiff had not known plaintiff or were not sufficiently familiar with his practice to furnish a recommendation entitling him to a rating. Plaintiff had only recently moved to Hickory and opened his law practice, and it is not unusual for

it to take several years to become well enough known to the other lawyers to acquire a rating. Plaintiff repeatedly informed Martindale that he was not interested in having a rating of any kind published in the directory; he simply wanted to have his professional card published in the biographical section without any rating, but Martindale refused to do that, due to its established rules. Plaintiff accused Martindale and ABA of violating the ABA Canons and the Canons of the State Bar by refusing to allow him to advertise in its directory, and he requested ABA and the State Bar to investigate him complaint and take action to compel martindale to accept his advertising card. Both of those defendants declined to investigate or take any action. The

ABA was fully informed at all times of Martindale's eligibility requirements to publish professional cards in the directory with respect to the ratings of lawyers under its rating system. ABA's law list committee members made inspections at Martindale's premises of the operationof the rating system, and ABA annually approved Martindale as a reputable publisher of a reputable directory, and as being in compliance with ABA's rules and standards.

In the fall of 1976 Martindale's investigation of plaintiff resulted in the receipt of sufficient recommendations to support a "cv" rating for him, and Martindale notified plaintiff of that fact and that a "cv" rating would make him eligible to publish his card in the geographical

section, although not in the biographical section, as he had demanded. Plaintiff agreed to have his card published in the georgraphical section of the 1977 directory, but requested that the rating of "cv" be deleted from the listing in the directory. Martindale responded that its current policy required a rating to appear with professional dcards in the geographical section, and declined to delete the rating as plaintiff had requested. Plaintiff allowed the card to be published along with the rating, although under protest, contending that Martindale's policy and practice were unlawful. Martindale's policy changed for the 1978 directory so that it published his professional card in the

georaphical section without showing the rating of "cv."

Other facts are established by the record relevant to plaintiff's allegation that Martindale unlawfully discriminated against him and other lawyers similarly situated in its sale of advertising in the directory by the publication of lawyers' professional cards in the biographical section. At all times pertinent to this suit Martindale's rules provided that a minimum of ten years admission to practice was requried for an attorney to recceive an "a" rating, five years for a "b" rating, and three years for a "c" rating (Martindale's affidavit by Mr. deSherbinin, paragraph 6). Martindale required that a lawyer have an "a" or a "b" rating in order to publish his

professional card in the biographical section, and a "c" rating in order to publish his card in the geographical section (de Sherbinin affidavit and Martindale's affidavit by Hildebrand). As stated earlier, Martindale rates law firms based upon the ratings for the principal lawyers in the firm individually. Martindale at the time in question followed the practice of allowing lawyers to publish their professional cards in the biographical section of the directory even though they were associated with a law firm which had an "a" or a "b" rating. Such lawyers, therefore, who were similarly situated as the plaintiff with respect to being unrated in the directory, were allowed the privilege of advertising in the biographical section which was

denied to plaintiff by Martindale. At least twelve lawyers practicing in Hickory, North Carolina whose length of admission to practice was less than plaintiff's and was less than the minimum time required by Martindale to establish a rating in the directory, and who did not have ratings in the directory, were allowed to have their professional cards published in the biographical section of the 1974 edition of Martindale-Hubbell Law Directory, while Martindale declined to allow plaintiff to have his card published in the same edition of the directory. (Martindale-Hubbell Law Directory, 1974 Edition, pages 991-992, 2475B-2481B; Martindale's affidavits by de Sherbinin and Hildebrand; Martindale's answers to plaintiff's requests for admissions Nos.

15 through 17; Martindale's answer to plaintiff's interrogatory No. 8.)

Martindale asserts several defenses to the four counts of the complaint asserted against it, ans asserts one broad defense to all of the counts; namely, that all of the actions and conduct of Martindale relied upon by plaintiff in support of its claims constitute nothing but the unilateral exercise by a private publisher of a legal directory of its right to determine what advertising it will accept in its directory and its right to reject advertising, analogous to the right of a seller of goods to select his customers. Martindale says that its refusal to sell advertising to plaintiff and the others is based upon predetermined standards which have no

relationship to the creation or furtherance of monopolistic power. Martindale cites the general rule applying to newspapers as stated in 58 Am. Jur. 2d, Newspapers, Section 36, that publishers of periodicals may accept or reject advertising at will. But that right to reject advertising is not an unqualified right, as is shown by the continuation of the section from American Jurisprudence just cited, which states that publishers are subject to the Sherman Act where anti-trust violations exist. Martindale seeks to distinguish this case from two leading Supreme Court decisions that newspapers have only a qualified right to reject advertising, Lorain Journal Co. v. U.S. 342 U.S. 143 (1951) and Associated Press v. U.S. 326 U.S. 1 (1944). In

support of that distinction Martindale points to the fact that newspapers are often the only form of advertising medium available to advertisers, whereas Martindale is only one of several dozen law lists published in the United States. However, the record here does not support such a factual distinction. Martindale's directory is the only general legal directory certified for ABA as being reputable, and it is the only law list approved by ABA in which atorneys are rated for legal ability and in which the ratings are published. Martindale has not denied plaintiff's allegation (paragraph 25 of the complaint) that there is no legal directory remotely comparable to Martindale's directory in depth and comprehensiveness of coverage, scope of

distribution, and use in the legal profession and related fields, and there was no alternative legal publication for publication of plaintiff's professional card (except by Martindale's general denial in answering paragraph 25, which is insufficient on summary judgment). For purposes of this motion there is no genuine dispute as to the fact that Martindale possesses a monopolistic position in the field of publishing a general legal directory in the United States.

Therefore, upon the rule in Lorain Journal, supra, Martindale does not have the right to reject advertising in its directroy where the effect thereof maybe to restrain or limit competition in a trade or business affecting commerce, either interstate commerce as

it relates to the first and second counts, or intrastate as it relates to the third and fourth counts.

It will facilitate the dispostion of this motion to consider first the third and fourth counts alleging claims under North Carolina General Statutes Sections 75-1 and 75-1.1, since only intrastate commerce is involved in those counts. The third count alleges violation of N.C.G.S. Section 75-1, the central prohibition of which reads as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Caroliina is hereby declared to be illegal." It copies the language of Section 1 of the Sherman Act. G.S. Section 75-2 provides that any such combination or conspiracy

which violates the principles of the common law is also a violation of Section 75-1. The North Carolina Supreme Court holds that the body of law applying the Sherman Act is instructive in applying Section 75-1. Rose v. Vulcan Materials Co., 282 N.C. 643 (1973). As to the third count, Martindale makes two principal arguments, first that this case involves no contract, combination or conspiracy, but only unilateral action by Martindale developing its own standards and practices for publishing its directory. Martindale contends that the actions of ABA and State Bar in certifying the directory were merely passive, having no impact on Martindale's decision to restrict access to the biographical section of the directory by attorneys

wishing to advertise there. Secondly, Martindale argues that Rose v. Vulcan materials,, supra, and other North Carolina and federal cases involving actions between business competitors seeking damages for monopolistic practices or unfair competition engaged in by competitors indicate that this statute is restricted to such actions between business competitors. The cases are cited on page 17 of Martindale's brief. Actually, the reported decisions in those cases did not specifically refer to the statute at all, and appear to have been brought under common law rules regarding unfair competition. The fact that various North Carolina decisions have applied the law of unfair competition does not support an argument

that G.S. 75-1 does not apply to the general body of anti-trust law under the Sherman Act. Such an argument would immediately conflict with G.S. 75-2 and with the language of the North Carolina Supreme Court in Vulcan Materials, which included Sherman Act violations within the scope of Section 75-1. The statute does proscribe actions which restrain competition in trade within North Carolina, whether such actions affect competitors or whether they affect customers.

With regard to Martindale's first argument referred to above, that no contract, combination or conspiracy is shown to have existed here, it must be remembered that a plaintiff need not show that there was a formal or express agreement. Actions taken by two or more

parties can become a course of conduct amounting to concerted action by them, having a particular effect on business transactions. If the parties took those actions knowing what the direct results of them would be, and if the direct results necessarily restrained or limited competition in a trade or business, such concerted action would constitute a combination or conspiracy in restraint of trade or commerce, and the parties would be subject to suits or prosecutions under the anti-trust laws. Putting the matter bluntly, Martindale has admittedly carried on a course of conduct for many years in publishing its directory by which it restricts advertising in its directory to a certain category of lawyers (those with "a" and "b" ratings) and refuses to sell its

advertising space in the directory to other lawyers in the same cities and areas who do not have such ratings but who are in competiition with the lawyers in the preferred category. The Supreme Court now holds that the practice of law constitutes the performance of services in exchange for money, and that such exchange is commerce in the ordinary usage of that work. The court held that there is no "learned profession exemption" of lawyers under the anti-trust laws, and that activities by lawyers which would restrain competition in the practice of law may violate the anti-trust laws. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1974). That reasoning would apply equally to anticompetitive conduct by nonlawyers

which restrains competition amony lawyers.

Martindale correctly makes the point that to be a violation of Section 75-1 the restraint must be unreasonable. The Supreme Court held in Goldfarb, supra, that the minimum fee schedule of defendant Bar Association and defendant Virgina State Bar constituted a per se violation of the Sherman Act, and although no specific amount of competition was shown to be affected, the court held that that does not mean that interstate commerce was not affected. The court said, "Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved." The court said that purchasers or consumers of the

services were deprived of the advantages which they derive from free competition.

Group boycotts or refusals to deal are also per se violations of the antitrust laws, and the facts shown here necessarily restrain plaintiff's ability to advertise his services. Also necessarily, a restraint on the ability of a person to advertise is a restraint on his ability to compete, The general public is therefore deprived of the free competition among lawyers to which the public is entitled, according to the Supreme Court's ruling in Goldfarb.

We are not concerned here with the propriety of advertising by lawyers or the right of lawyers to advertise. As is well known, the ethical regulations promulgated by ABA and the State Bar have been changed to permit certain

advertising in newspapers and elsewhere by lawyers, in addition to law lists, subject to limitations in the regulations. The North Carolina General Assembly has given the State Bar the authority to promulgate standards of ethical conduct by lawyers, including the matter of advertising by lawyers, and no private organization or committee or corporation has any authority to establish standards determining what lawyers or classifications of lawyers have the right to advertise their services. Yet Martindale on page 8 of its brief states, "Martindale-Hubbell has the right to establish standards which must be met in order for an attorney to gain access to the biographical section. This right extends to cover decisions on the part

of Martindale-Hubbell to refuse access to an attorney who has not met such standards." The court does not suggest that Martindale maintains its rules and standards for any reason other that to promote the best interests of the legal profession; or that Martindale intended to harm the economic interest of any lawyers. In fact, Martindale explained in the Hildebrand affidavit (paragraph 22) the reasons for its directory policies, as follows: "Martindale-Hubbell's objective is, and always has been, to publish a directory, in accordance with legal requirements and high ethical standards, which will provide a worthwhile service to those who have occasion to engage legal counsel at places where they do not now who is available to render the services

desired. The standards, practices and procedures developed by Martindale-Hubbell over the years with respect to the listing and rating of lawyers have proven effective toward achieving that objective. Martindale-Hubbell does not involve itself in any respect in the selection of such counsel." There would be no valid legal objection to such policies and practices by a publisher of a legal directory if there were one or more other general legal directories comparable to Martindale's directory which could provide an alternative medium in which lawyers could advertise. On the other hand, as it was held in Lorain Journal, supra, a publisher who holds a monopolistic position may not lawfully refuse to deal with prospective advertisers if the result

would be to restrain or lessen competition in trade or commerce, whether among manufacturers or sellers, or among lawyers, under the principal of Goldfarb, supra.

We return now to Martindale's contention, stated earlier, that with regard to the third count all of its actions relating to the publishing of advertising cards by lawyers in the directory, including plaintiff, were taken by Martindale unilaterally and without any agreement, conspiracy, or concert with ABA or the State Bar. Nevertheless, the record shows several facts which must be considered in determining that question. The State Bar governs the conduct of lawyers in North Carolina, including their advertising. The Canon of the State Bar

(DR2-102(6)) allows lawyers to advertise in a reputable law list or legal directory, and provides further that a law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards, thus delegating to ABA the authority for determining which law lists will be permitted to carry advertising by lawyers in North Carolina. ABA has accepted that delegation of authority and has exercised it for many years by certifying annually the law lists and directories which it considers to be reputable, meaning those which it considers to be reputable, meaning those which it considers are in compliance with ABA's rules and standards. Martindale has accepted the

benefits of ABA's certification for many years, which allows it to publish and sell its directories containing biiographical and professional data concerning lawyers along with their legal ratings. At Martindale's invitation ABA visits and inspects its facilities and its system of rating and publishing of advertisements. They both know that ABA's approval and certification is necessary to enable Martindale to publish and sell the directory in that manner. ABA has promulgated a model code of professional responsibility which it recommended for adiption in the various states, including North Carolina; and the ABA code was adopted in North Carolina and furnishes ABA the authority by which it certifies Martindale's directory as

being entitled to contain advertising by North Carolina lawyers. The State Bar, ABA and Martindale all know these things, and all have been conducting their affairs for a long time in reliance upon those arrangements. ABA is entirely familiar with Martindale's system of rating and requirements for publishing advertising, and therefore knows that its certification of Martindale is a necesary link in the chain of the decision making process which determines which lawyers can advertise in the directory. Martindale knows that it needs ABA's approval to publish advertising; it has sought and received ABA's approval; and Martindale has known at all times that ABA's approval and certification is an essential element of its policies and

practices in publishing the directory and its advertising. It has relied for many years upon that system and those arrangements requiring the concurrence of all three defendants. Without question the three defendants have established a course of conduct which amounts to concerted action resulting in the restrictions placed on advertising by lawyers in the directory and also resultng in the discrimination imposed upon plaintiff and lawyers similarly situated with respect to advertising in the directory. Martindale cannot escape from this arrangement by stating that it developed its rating system and advertising policies and practices unilaterally and with motives directed toward upholding high standards in the legal profession. The court accepts as

correct the statement of Martindale as to its sole authorship of the rating system and policies and its reasons for adopting and carrying them out. But where Martindale knows the necessary effect these practices will have upon lawyers practicing in North Carolina and the restrictions it imposes upon advertising by lawyers and competition among lawyers Martindale cannot avoid being held responsible for those results.

There are several additional arrangements between Martindale and ABA relating to the publication and contents of the directory which, although they are not necessary in establishing the concerted action described by the court, do show the existence of specific agreements between the two concerning

the directory. ABA furnishes its membership list of lawyers to Martindale, which enables Martindale to indicate in the directory which lawyers are members of the ABA; and that has been formalized in a written contract providing that Martindale pays ABA fifty cents per member for the list. Also, Martindale provides ABA with a free copy of the directory.

The Third Count alleged a conspiracy between Martindale and ABA, and by realleging paragraphs ten through twenty of the complaint it also alleged that Martindale had monopolized or was attempting to monopolize the business of publishing a general legal directory, and that as a monopolist Martindale had unlawfully refused to sell plaintiff advertising in the directory and had

unlawfully discriminated against plaintiff individually and others similarly situated with respect to advertising in the directory. For purposes of this motion, the record shows a conspiracy by concerted action between Martindale and ABA which would tend to lessen competition among lawyers and in advertising by lawyers, and also shows that Martindale has a monopoly in that business, and did refuse to sell advertising to plaintiff and discriminated against him and others who were unrated in the directory. It is the opinion of the court that N.C.G.S. Section 75-1 applies not only to combinations and conspiracies in restraint of trade, but also to other restraints upon trade and competition prohibited by the anti-trust laws,

including the Sherman Act. The court therefore concludes that Martindale has not carried its burden of showing that upon the undisputed facts in the record it is entitled to its motion for summary judgment, and the motion should therefore be denied as the third count.

The fourth count is based upon the same acts and conduct as the other counts, and plaintiff's claim is laid under N.C.G.S. Section 75.1.1 prohibiting unfair and deceptive acts and practices in trade or commerce within North Carolina. Martindale advances two defenses to the fourth count, the North Carolina one-year statute of limitations, G.S. Section 1-54(2); and the argument that the statute was directed only at "customer fraud." The one-year statute applies to

a penalty, and would therefore apply only to the treble damage element of the claim. Ordinary compensatory damages, if proved, would come under the three-year statute of limitations. Miller's Motors v. Ford Motor Co. 149 F.Supp, 790 (M.D. N.C. 1957). The evidence shows that Martindale's refusal to allow plaintiff to advertise in the biographical section of the directory occurred with the 1974 edition of the directory and continued at least through the 1978 directory. For those reasons the extent of protection Martindale might enjoy under the one-year statute could only be determined at trial, and therefore Martindale is not entitled to its motion for summary judgment on that ground.

Martindale bases its agrument that this statute was directed only at consumer fraud upon some language of the North Carolina Supreme Court in State ex rel. Edmisten v. J. C. Penny Co. 292 N.C. 311 (1977) and upon the fact that in 1969 when the General Assembly enacted several amendments to Chapter 75 and added Section 75.1-1, it changed the name of Chapter 75 from "Monopolies and Trusts" to "Monopolies, Trusts and Consumer Protection." On the latter point, the language of a statute prevails over the caption of the statute, and section B of G.S. Section 75-1.1 clearly applies the statute to disputes between two or more persons engaged in business as well as to disputes between persons engaged in business and the consuming public.

With regard to the Penney case the Supreme Court did not hold that the statute applies only to consumer fraud. The action involved debt collection activities by a retail store chain and the court had to determine whether the acts complained of were "in the conduct of any trade or commerce," and the court concluded that debt collection activities did not involve a "sale" necessary to constitute a transaction in trade or commerce. Moreover, the North Carolina Court of Appeals has applied the statute to the rental of residential housing, Love v. Pressley 34 N.C. App. 503 (1977); and it has been held to apply to unfair methods of competition in the insurance industry, Ray v. United Family Life Insurance Co. 430 F. Supp. 1353 (W.D.N.C. 1977). Also, the

portion of the Penney decision quoted on page 20 of Martindale's brief clearly shows that a statute applies to disputes between two businesses as well as between businesses and the consumers. The court stated that the statute was to maintain "ethical standards of dealings between persons engaged in business, and between persons engaged in businessand the consuming public within this state." The emphasis on the word "and" was added by the court. Finally, in his article discussing the antitrust laws contained in Chapter 75 of the North Carolina General Statutes, appearing in 50 N.C. Law Rev. 199, Professor William B. Aycock expresses the opinion that by virtue of N.C.G.S. Section 75-1.1(b), this statute should now be construed to apply to concerted

refusals to deal. Martindale's brief (page 20) states that Martindale's refusal to allow plaintiff to advertise in the directory, "cannot constitute 'consumer fraud' since there is no seller-purchaser relationship." On the contrary, lawyers pay Martindale for publishing their advertising cards in the directory, which is clearly a sale.

Accordingly, the court concludes that Martindale is not entitled to its motion for summary judgment as to the Fourth count. Since the Third and Fourth Counts are before this court under its diversity jurisdiction, the court can hear and determine those claims irrespective of what disposition is made of Martindale's motion for summary judgment as to the first and second counts.

That brings us back to the first and second counts, which are based upon Sections 1 and 2 of the Sherman Act. The acts and conduct complained of in these counts are identical with those involved in the Third and Fourth Counts, and for purposes of this motion we are considering the record which shows the existence of the same conspiracy or concerted action and the same refusal by Martindale to sell advertising in the directory to plaintiff imposed upon plaintiff by Martindale's advertising practices in the directory. With regard to the second count we are dealing with the same monopolistic position occupied by martindale in the legal directory publishing field. The significant difference here is that either the plaintiff's allegations indisputed by

the defendant, or the facts disclosed by the record, must satisfy the interstate commerce requirement of the federal antitrust laws, including the Sherman Act. The plaintiff's allegations were related at the beginning of this opinion, and will not be repeated here. Martindale made a general denial in its answer, but has presented no affidavits, exhibits or evidence controverting plaintiff's allegations. Since the movant for summary judgment has the burden of establishing the absence of genuine issues of material fact, if plainitff's allegations are sufficient to satisfy the commerce requirements, Martindale is not entitled to its motion until it has presented sufficient facts to establish the absence of the necessary effect on commerce. Drexel

v. Union Prescription Centers, Inc. 582 F.2d 781 (3rd Cir. 1978); thomas v. Petro-Wash, Inc. 429 F.Supp. 808 (M.D. N.C. 1977).

Hence we must examine the sufficiency fo plaintiff's allegations of effect on interstate commerce, keeping in mind that on this motion for summary judgment we must consider the facts alleged or shown in the evidence in the light most favorable to the plaintiff. Without question Martindale is engaged in the light most favorable to the plaintiff. Without question Martindale is engaged in intestate commerce in the distribution and sale of its directory and its sale of advedrtising space in the directory to lawyers throughout the country including North Carolina. Martindale's actions in

carrying out its rating system and restrictions on advertising in the directory are carried out uniformly throughout the nation, and they are also carried out specifically within the State of North Carolina with respect to its ratings of North Carolian lawyers and its dealings with lawyers within North Carolina concerning advertising. Plaintiff alleges that Martindale restrained trade in the sale of legal services to the public among the several states and also within the geographical area of North Carolina and the Hickory area, and that Martindale also unlawfully restrained plaintiff's ability to compete with other lawyers in the local area as defined. While those allegations are not as specific or extensive as might be desired, they are

sufficient under the standards of the decisions by the Third Circuit and Judge Gordon in the Middle District of North Carolina stated above. As Judge Gordon said in Thomas v. Petro-Wash, supra, "If the plaintiff has alleged sufficient facts to satisfy these [interstate commerce] requirements then it would not be proper to grant summary judgment on this ground unless the defendants have presented sufficient facts, other than a general denial in their answer, to establish the absence of the necessary effect on commerce."

With regard to any incompleteness in plaintiff's allegations, in Drexel v. Union Prescription, supra, the Third Circuit was considering a wrongful death action on behalf of a decendent who died from an improper prescription

the Third Circuit denied the defendant's motion for summary judgment saying, "However, because it was the burden of defendant, the movant for summary judgment, to establish the absence of genuine issues of material fact, we cannot deem plaintiff's failure to submit evidence of reliance as fatal to her cause at this stage of the proceeding," citing Judge Gordon's decision in Thomas v. Petro-Wash, supra. In answer to Martindale's argument that it is entitled to its motion because plaintiff has not come forward with sufficient evidence to show an effect on interstate commerce, Judge Gordon in his Petro-Wash decision also said, "Rule 56 further provides that an adverse party [plaintiff here] may not rest on the mere allegations in his

pleadings. However, the plaintiff is not required to come forward with additional proof unless the defendant firs establishes that the facts are other than as alleged in the plaintiff's complaint. In the present case the defendants have not presented any facts or evidence tending to show that the commerce requirement has not been met other than by a general denial in their answer."

Again with regard to the sufficiency of plaintiff's showing of an effect upon interstate commerce, Martindale forcefully argues several points. First, it has frequently been held that the practice of law is an entirely local activity not involving interstate commerce. That is true, as is shown by the cases cited by defendant

in its brief on pages 10-13. Further, the travel of clients from one state to another in order to obtain legal services from a lawyer is not an activity in interstate commerce; that is also supported in defendant's brief on page 11. But the Supreme Court in Goldfarb, supra, has opened a rift in those principles, and it cannot be said at this stage of the prodceedings that plaintiff will not be able to offer proof at trial that his law practice affects interstate commerce. It is clear from the pleadings and other facts that the restrictions placed on advertising by lawyers in the directory by the concerted action of Martindale and ABA necessarily imposed a severe limitation on plaintiff's ability to advertise his services (and the ability

of many other lawyers in North Carolina to advertise theirs) in the only general legal directory available for such advertising. It is common knowledge that out-of-state clients seeking North carolina lawyers to represent them and out-of-state lawyers referring cases to North Carolina lawyers frequently utilize Martindale's directory for those purposes. A restraint upon the ability of lawyers to advertise necessarily limits their ability to compete, and conduct causing such a limitation upon competition is a violation of the antitrust laws.

Thirdly, with respect to the claim of monopolization in the Second Count, Martindale contends and argues that plaintiff is not within the "target

area" of the alleged monopolization, and therefore has no standing to sue, citing cases on pages 14 and 15 of its brief. Martindale's argument is that a plaintiff must show the existence of a particular market as to product and market area, and that plaintiff competes with the defendant in the market area and with respect to the products comprised in the allegations. Martindale states correctly that under plaintiff's allegations a competitor of Martindale would have standing to sue for Martindale's alleged monopoly of the busines so publishing legal directories, and that plaintiff is not a direct victim of the alleged conspiracy to monopolize that business. But that is too narrow a view of the scope of prohibited activity under the Sherman

Act. The court dismissed earlier the principle that concerted refusals to deal are violations of the Sherman Act, and that a unilateral refusal to deal by a monopolist is also a violation. The Fourth Circuit holds to that rule in South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966), cert. den., 385 U.S. 934. The district court dismissed that suit on defendant's motion for summary judgment because there was a lack of privity of contract, direct relationship or mutual competition between plaintiffs and defendants, and that plaintiffs were therefore not injured "by reason of anything forbidden in the antitrust laws." The Fourth Circuit reversed, holding, as this court suggests, that such an application of the federal

antitrust laws is too narrow. The court said, "If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has a standing to sue under [the antitrust laws]." The court there referred to plaintiff's sector of the economy, saying "this sector is sometimes designated as the 'target area' of the defendnats' illegal practices." The court further declared that the defendants' contentions only showed that the parties were not competitors. "It does not establish that the plaintiffs were not injured by the alleged prohibited acts." The Fourth Circuit additionally quoted from Mandeville Island Farms,Inc. v. American

Crystal Sugar Co. 334 U.S. 219 (1948), relied upon Martindale, as follows: "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. . . . the act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated . . . . The privot of decision presently is whether the defendants' asserted conduct was the proximate cause of plaintiff's asserted injury." The court considers that a sufficient answer to Martindale's argument on this point. The court has carefully considered the cases cited by Martindale in its brief on the question

of affect on c1974), not cited in the briefs. In Greenville Publishing Co. Inc., supra plaintiff and defendants both published shoppers' guides in free weekly tabloids of advertising in the City of Greenville, North Carolina and were therefore competitors in that business. Defendants also published the only daily newspaper in Greenville. Plaintiff claimed that defendants set their shoppers' guide advertising rates below cost to destroy the plaintiff's business. The district court entered summary judgment for defendants, and the Fourth Circuit reversed in an instructive opinion by Judge Craven. The court will not elaborate upon the facts (and suggests a careful study of the decision), but will summarize Judge Craven's conclusions. An antitrust

plaintiff may show connection with interstate commerce by showing that the anti-competitive conduct occurred in interstate coimmerce, or by showing that the conduct, though wholly intrastate, had a substantial effect on interstate commerce (496 F2d at 795). The defendants urged the court to hold that the only relevant inquiry is the victim's involvement in interstate commerce, but the court said that the Supreme Court has not endorsed that theory, and that the Supreme Court's approach strongly implies that the Sherman Act protects the market as well as the victim. Judge Craven said "Defendants' theory would undermine that protection. It would allow an interstate trader to destroy local competitior as long as it acted before

they captured any of the interstate trade. To avoid such a result, we hold that the Sherman Act applies to the alleged monopolization of an interstate market even though the immediate vicim may not be engaged in interstate commerce. Cf. Moore v. Mead's Fine Bread, Co., 348 U.S. 115 (1954)." Judge Craven stated in a footnote that the alleged monopolization is directed specifically at the Greenville Advertising Market. "If plaintiff proves that this market is 'in commerce' and that defendants' act constitute a monopolization or a restraint of trade, prohibition of defendant's conduct would justifiable as a means of protecting interstate commerce in advertising." (That is analogous to plaintiff's argument in our case that his practice

of law in Hickory, North Carolina is "in commerce," as to which the Supreme court in Goldfarb opened the door to permit a plaintiff to show proof thereof.)

In Greenville Publishing Co. Judge Craven further found that the evidence in the record on the interstate commerce issue was meager, and contains evidence in the record on the interstate commerce issue was meager, and contains evidence supporting the positions of both parties. Judge Craven said, "Finally defendants urge us to affirm the summary judgment on the ground that plaintiff has shown no causal connection between defendants' conduct and The Advocate's losses." This argument is premature on motion for summary judgment," citing South Carolina Council of Milk Producers, supra.

There is an additional reason why the court concludes that the defendants' motion for summary judgment should be denied as to all counts. It is held by the Supreme Court and by the Fourth Circuit that dismissal by summary judgment should be entered sparingly in antitrust cases, and only when it is entirely clear that all of the material facts have been established by the record. In Norfolk Momument Co., Inc. v. Woodlawn Memorial Gardens, Inc. 394 U.S.700 (1968), the Fourth Circuit had affirmed district court dismissal of plaintiff's suit against defendants for violating Sections 1 and 2 of the Sherman Act, upon summary judgment motion by defendants. The Supreme Court reversed, stating:

> "We express no opinion, of course, on the strength or weakness of the petitioner's case, but hold only that the alleged conspiracy had not been conclusively disproved by pretrial discovery and that there remained material issues of fact which could only be resolved by the jury after a plenary trial. As we have cautioned before, 'summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.' Poller v. Columbia Broadcasting System, 368 U.S. 464, 473."

Similarly, in South Carolina Council of Milk Producers, just discussed, the Fourth Circuit amplified upon its reversal of the district court dismissal of plaintiff's suit. The Fourth Circuit stated that it was not finding that the defendants' actions the plaintiffs' damage. "Our judgment is only that the complaint when measured against the

defendants' moving papers for summary judgment, presents a triable antitrust issue. Dismissal of a Sherman Act claim on motion, we are admonished, should be 'sparingly practiced.' Poller v. Columbia Braodcasting System, Inc., 368 U.S. 464 (1962). '[T]o state a claim upon which relief can be granted underthe section [Section 1, Sherman Act], allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all that the law requires.' Radiant Burners, Inc. v. Peoples Gas Light, 364 U.S. 656 (1961). Disposition on motion is not warranted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

There is a final reason why the court recommends that the motion be denied as to all four counts. The reasons for denial as to Counts Three and Four are clear from the court's discussion of those counts above. On Counts 1 and 2, the plaintiff's showing that the defendants' conduct may have injured the intrastate business transacted by plaintiff (law practice rendered in interstate commerce) or which plaintiff was attempting to transact, but was restrained from doing so by the defendants' conduct, leaves something to be desired. Nevertheless, the decisions dealing with this question discussed above, especially Greenville Publishing Co., South Carolina Council of Milk Porducers, Drexel v. United Prescriptions Centers, and Thomas v.

Petro-Wash strongly indicate that the antitrust issues in this case should not be disposed of upon a motion for sumary judgment. A final reason for retaining the First and Second Copunts for further proof of the commerce requirements is that the Third and Fourth Counts involving the identical anti-competitive conduct do not require a showing of interstate commerce involvement and are therefore on stronger jurisdictional grounds. Since they are to be retained for proof at trial, it would be far better to submit the entire controversy to trial.

Accordingly the court recommends tht the defendants' motion for summary judgment be denied as to all counts.

This the 30th day of August, 1979.

L. D. Howell, United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA RALEIGH DIVISION

OMA H. HESTER, JR., Plaintiff	NO. 76-0048-CIV-5
VS.	MEMORANDUM OF DECISION AND ORDER
MARTINDALE-HUBBELL, INC., AMERICAN BAR ASSOCIATION and NORTH CAROLINA STATE BAR, Defendants	

In this antitrust action, plaintiff Hester, an attorney and member of the North Carolina bar, claims he has been unlawfuly discriminated against as a result of the advertising policy of defendant Martindale-Hubbell, Inc. According to the plaintiff, Martindale's policy and practice of listing attorneys in its Legal Directory has injured and continues to injure him in the establishment of his law practice. Inhis six-count complaint, plaintiff contends the American Bar Association ("ABA") conspired with

Martindale-Hubbell to restrain trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1, 2, and Sections 75-1 and 75-1.1 of the North Carolina General Statutes. Hester further alleges defendant North Carolina State Bar cooperated in the condoned the discrimination against him, and through the adoption and enforcement of DR2-102[1] of the Code of Professional Responsibility, has denied him due process and equal protection of law.

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1. Prior to its amendment in 1978, see Footnote 6 infra, DR2-102 provided:
"(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, or similar

The case is before the court on the recommendation and supporting memorandum of United States Magistrate Logan D. Howell filed August 31, 1979, that Martindale's motion for summary judgment be denied as to all counts. Martindale-

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(1. cont.)

> professional notices or devises, except that the following may be used if they are in dignified form:
>
> "(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified

Hubbell has filed extensive objections to the Magistrate's findings, conclusions and recommendations.[2] Also before the court is the Magistrate's earlier memorandum and recommendation that the North Carolina State Bar's motion for summary judgment be denied.[3] The parties have filed no response to this recommendation. For

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(1. cont.) by the American Bar Association as being in compliance with its rules and standards . . . ."

2. Defendant ABA, while not a party to the summary judgment motion, has filed "comments" to the Magistrate's memorandum and recommendantion.

3. Court records reveal that this memorandum was filed March 29, 1978. However, as a result of an inadvertent oversight, it was not docketed or served on the parties until August 8, 1979. The parties were given ten days from the date of service to file written objections pursuant to 28 U.S.C. Section 636(b).

the reasons set forth herein, Martindale-Hubbell's motion for summary judgment is allowed, the North Carolina State Bar's motion for summary judgment is allowed and the action against the ABA is dismissed sua sponte.

FACTUAL SETTING

On August 11, 1973, plaintiff wrote Martindale-Hubbell and requested information concerning the publication of his professional card in the biographical section of the 1974 edition of the Martindale-Hubbell Law Directory (Plaintiff's Complaint, Exhibit D). By letter of December 10, 1973, Martindale-Hubbell informed Hester that an investigation undertaken pursuant to his request resulted in the finding that Hester did not have the necessary endorsements to support an "av", "bv" or

"cv" rating (Plaintiff's Complaint, Exhibit H).[4] In accordance with Martindale's uniform policy of requiring subscribers publishing their professional card in the biographical section of the Directory to have attained either an individual or law firm rating of "av" or "bv," Hester was told that he would appear only in the Directory's geographical section.[5]

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4. Martindale's rating system provides for three classifications of legal ability: "a" (very high), "b" (high) and "c" (fair). According to Martindale Hubbell, no rating of legal ability is published unless the recommendations received also support the "v" portion of the rating, i.e., "av", "bv" or "cv". The "v" is an abbreviation for "very high" general recommendation. Ratings are based on confidential recommendations furnished Martindale by lawyers and judges in the city or area where the rated attorney practices.

COUNT 1

Plaintiff argues that the combined effect of Martindale's advertising policy and the regulation of legal advertising by the ABA and the North Carolina State Bar constitutes a

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5. Martindale-Hubbell undertakes to list all attorneys practicing in the United States or Canada in the geographical section of the Directory. The entry for each attorney includes his or her name, date of birth, college and law school attended, date of admission to the bar, office address, and in many instances the rating of the attorney. Beginning with the 1978 edition, it is no longer necessary to have a rating in order to enter a subscription for "professional representation" in the geographical section. As additional information, attorneys may now list in the geographcial section their cable address, telephone and telex number, names of partners and associates, fields of law in which the lawyer or firm concentrates, specialties of practice, and

conspiracy in restraint of trade and a violation of the Sherman Act. This conclusion is supported by Hester's analysis of former DR2-102 of the Code of Professional Responsibility.[6] This disciplinary regulation states that attorneys may advertise in "reputable" law lists and that any law list "certified" by the ABA is conclusively presumed to be reputable. According to Hester, his ability to advertise in the Martindale Directory is subject to the

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(5 cont.) the names of not more than ten clients or references. The biographical section, on the other hand, includes such information as an attorney's legal publications, memberships in legal fraternities, societies and associations, awards, type of practice and a listing of representative clients.

6. This section of the Code of Professional Responsibility was amended by the North

combined regulation and control of Martindale-Hubbell, the ABA and the North Carolina State Bar. Plaintiff asserts the Section 1 conspiracy in restraint of trade is further evidenced by the alleged failure of the ABA and

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(6. Cont.)
Carolina Supreme Court on February 24, 1978. The amended DR2-102 states in Section (A)(5):

"(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional anouncement cards. . . law lists, legal directory listings. . . except that the following may be used if they are in dignified form:

"(5) A listing in a reputable law list, legal directory, or a directory published by a state, county or local bar association, giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. . . . N.C.G.S. Volume 4A, Appendix VII, DR2-102(A)(5) (1979 Cum. Supp.).

the North Carolina State Bar to "act on the merits" of his complaint against Martindale-Hubbell.

Section 1 of the Sherman Act states that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. Section 1.

Essential to jurisdiction over a Section 1 cause of action is that the conspiracy complained of be in restraint of trade or commerce among the several states. Gulf Oil Corporation v. Copp Paving Company, Inc., 410 U.S. 186 (1974). Thus, the allegedly illegal conduct must constitute either activities that are in the flow of interstate commerce or activities which, though occurring purely on a local level, substantially affect interstate

commerce. Mandeville Island Farms, Inc. v. American Crystal Sugar Company, 334 U.S. 219 (1948): Harold Friedman, Inc. v. Thorofare Markets, 587 F.2d 127, 132 (3rd Cir. 1978). Martindale-Hubbell contends plaintiff has failed to show that his law practice is within the flow of interstate commerce or that it has a substantial effect on interstate commerce.

Responding to defendant Martindale's motion, plaintiff argues that the burden is upon the moving party to show that there is no effect on interstate commerce. Hester rests upon his initial assertion that interstate commerce has been affected and claims Martindale has offered no evidence to the contrary. Paragraph 20 of the complaint clearly focuses upon the

effect of defendants' alleged illegal acts upon Hester's business and the "advertising of professional legal services available for sale and delivery to the public in the State of North Carolina and particularly in the 25th Judicial District . . . ." While this allegation pertains to purely local impact, Hester has stated in paragraph 9 that the Directory is published and distributed in interstate commerce in such a manner and with contents calculated to restrain interstate commerce by affecting the sale and delivery of legal services. While Martindale has focused upon plaintiff's law practice and argued that he must show its effects on interstate commerce, Hester contends the prevasiveness of the Martindale Directory within the legal

profession and its impact upon the availability of legal services is sufficient to establish the requisite effect on interstate commerce.

The proper perspective from which to judge the affecting commerce issue was reiterated in Greenville Publishing Company Inc. v. Daily Reflector, Inc., 496 F.2d 391, 396 (4th Cir. 1974):

> [D]efendants urge us to hold that the only relevant inquiry is the victim's involvement in interstate commerce. . .[T]he Supreme Court has not endorced this theory. . . The Supreme Court's approach strongly implies that the Sherman Act protects the market as well as the victim."

See Page v. Work, 290 F.2d 323 (9th Cir. 1961). Granting plaintiff an exceptionally liberal interpretation of his complaint, the court finds that it cannot hold the alleged unlawful acts do not affect interstate commerce as a matter of law. This finding is made solely for purposes of the instant motion.

Section 1 applies to combinations, contracts and conspiracies, express or

implied, which restrain interstate trade. United States v. Parke, Davis & Company, 362 U.S. 29 (1960). Essential to such a violation of the antitrust laws is an agreement of combination "the purpose and effect of which is restraint of trade and suppression of competition." Viking Theatre Corporation v. Paramount Film Distributing Corporation, 320 F.2d 285, 293 (3d Cir. 1963). In the present case, plaintiff argues that the defendant bar associations, through their codes of professional responsibility and the ABA's process of law lists certification,[7] have conspired with Martindale-Hubbell to exclude him from advertising in the biographical section of the Directory and thereby unlawfully restrained

interstate trade. According to Hester, the conspiracy is further evidenced by the fact that (a) for thirty years prior to 1974, the ABA provided its membership list to Martindale free of charge;[8] (b) the ABA has been provided yearly copies of the Directory without costs; and (c) ABA members are so designated in the Directory.

In Harold Friedman, Inc. v. Kroger Company, 581 F.2d 1068 (3d Cir. 1978), the Court of Appeals for the Third Circuit analyzed the Supreme Court's

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7. ABA ended this practice of certification on February 10, 1978. See Affidavit of Robert I. deSherbinin at 5-6.

8. In 1974, a written contract was executed between the ABA and Martindale which provided that Martindale would pay to the ABA fifty cents per member for the Association's list.

opinion in Albrecht v. Herald Company, 390 U.S. 145 (1968), for guidance in determining when the concerted activity or cospiracy requirement of Section 1 has been met. The Friedman court identified the following crucial factors to test for "concerted activity" within the meaning of the Sherman Act:

"(1) [A]ll members of the combination knew of the defendant's purpose to restrain trade; (2) at least two members of the combination benefited by the restraint of trade and, in that sense, shared a common purpose in restraining trade; (3) the agreement by two members of the combination actually restrained trade, as opposed to merely facilitating the restraint; and (4) at least tow members of the combination intended to restrain

trade." Harold Friedman, Inc., 581 F2d at 1073.

See also Quality Mercury,Inc. v. Ford Motor Company, 542 F2d 466 (8th Cir. 1976), cert. denied, 433 U.S. 914 (1977); Cartrade, Inc. v. Ford Dealers Advisory Association, 446 F.2d 289 (9th Cir. 1971), cert. denied, 405 U.S. 997 (1972).

Applying the Friedman analysis in the present case; first, Hester makes a sweeping accusation that Martindale-Hubbell "in combination and conspiracy with the American Bar Association. . . planned, directed, controlled, published, and distributed. . . the Martindale-Hubbell Law Directory in a form and manner and with contents which were calculated to, and did, restrain

trade and commerce. . . ." The alleged restraint of trade is purportedly a direct consequence of Martindale's scheme for rating attorneys and its advertising policy. The gravamen of plaintiff's complaint is that as a sole practitioner without an "av" or "bv" rating, he is denied admission to the biographical section of the Martindale Directory; while attorneys with like experience, expertise and the same individual rating but who are associated with a law firm holding the "av" or "bv" rating are permitted to have published their professional data in the Directory's biographical section. It is uncontroverted that neither the ABA nor the North Carolina State Bar have at any time sought to influence, direct or control Martindale's efforts to rate

attorneys. Nor does plaintiff allege that either bar asociation has assisted in the establishment of Martindale's advertising policies. The ABA's act of certifying the Martindale Directory as a reputable general legal directory warrants no finding that either bar association knew of Martindale's alleged purpose to restrain trade. The composite of the ABA's alleged conspiratorial acts, i.e., receipt of a complimentary copy of the Directory, providing of the association's membership list to Martindale, finding that Martindale's refusal to publish plaintiff's professional card did not violate the Code of Professional Responsibility and certifying that Directory as reputable, is wholly disassociated with the advertising

restrictions alleged to have caused Hester injury. The court's review of the record discloses no evidence that the defendant bar associations knew of any alleged purpose on the part of Martindale to restrain trade.

Second, while plaintiff points to the fact that the ABA has received complimentary copies of the Directory, he makes no allegation that either the ABA or the North Carolina State Bar benefited by the alleged restraint of trade. Interestingly, the court notes that defendant Martindale would conceivably reap a financial benefit if it were to adopt a less restrictive advertising policy and comply with plaintiff's demands. The presence of a common purpose to restrain trade is not evidenced in the instant action by a

benefit to the defendant bar associations.[9]

Third, the agreement by the defendants must actually restrain trade as opposed to merely facilitating the restraint. As previously held, any agreement between the defendant bar associations and Martindale-Hubbell was wholly extraneous to the policies causing plaintiff's dissatisfaction. Cf., Farnell v. Albuquerque Publishing Company, 589 F.2d 497, 500 (10th Cir.

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9. The court is well aware that a finding of benefit to a co-defendant is unnecessary to establish liability. Duplan Corporation v. Deering Milliken, Inc., 594 F.2d 979 (4th Cir. 1979). Nevertheless, the presence or absence or a perceived benefit to a defendant in an antitrust action for restraint of trade is a viable factor to consider in making the initial determination of whether or not an actionable conspiracy exists. See Albrecht, 390

1978) (an antitrust plaintiff must not only show injury to his business or property, but he must show the injury directly resulted from a violation of the antitrust laws). While the ABA's act of certification might be said to have directed plaintiff to Martindale-Hubbell as an available advertising resource, this lawsuit has resulted because Martindale refused to permit Hester to publish the data he desired in the section which he wished to appear. Plaintiff has alleged no conspiracy between the parties which affected the latter determinations.

Finally, the court notes that an extremely strained interpretation of the record is necessary to even speculate that the defendant bar associations

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(9 cont.) U.S. 145 (1968); Harold Friedman, Inc., 581 F2d. 1068 (3d Cir. 1978).

intended to restrain trade by the actions alleged. Plaintiff does not argue that the associations have erred in the certification process and thereby unlawfully restricted his access to law lists and legal directories. He merely asserts that when examined in light of Martindale's advertising policies, the associations' acts show an intention to restrain trade.

The court concludes that the conspiracy or concerted activity requirement for a Section 1 violation is missing in the present case. What is present is simply a unilateral refusal to deal based on predetermined and announced criteria.

In United States v. Colgate & Company, 250 U.S. 300, 307 (1919), the Supreme Court held:

"[T]he [S]herman act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

Although the now well-known Colgate doctrine has been frequently criticized, it remains viable in antitrust law. Areeda, Antitrust Analysis 524-31 (2d Ed. 1974); 41 A.L.R.Fed. 1974 (1979), and cases cited therein. The circumstances of the present case, direct the court to the undeniable conclusion that Martindale-Hubbell has acted within its rights as a private business. Martindale has defined its marketing policy and applied it uniformly. The fact that plaintiff may be unable to utilize Martindale's

services in the manner and to the extent which he desired does not place Martindale in violation of the antitrust laws. See Fuchs Sugars and Syrups, Inc. v. Amstar Corporation, 602 F.2d 1025 (2d Cir. 1979); McElhenney Company v. Western Auto Supply Company, 269 F. 2d 332 (4th Cir. 1959).[10]

COUNT 2

Hester claims that Martindale-Hubbell, with the knowledge, cooperation and approval of the ABA, monopolizes or attempts to monopolize commerce in violation of Section 2 of the Sherman

10. The parties have exhaustively argues Lorain Journal v. United States, 342 U.S. 143 (1951), on the issue of Martindale's claimed unilateral refusal to deal. Lorain did not abrogate the Colgate doctrine, however, and the court finds Lorain factually distinguishable from the instant action.

Act. 15 U.S.C. Section 2. This allegation is based on plaintiff's assertion that he has no alternative legal publication, which is comparable to the Martindale Directory in depth, comprehensiveness and scope of distribution, in which to have his professional card published. He argues his Section 2 claim is further supported by the facts that Martindale is the only attorney listing wherein attorneys are rated and the only list classified as a "general legal directory" by the ABA.

The manufacturer and marketing of a product of unique character and exceptional quality does not render the manufactuer or those who deal with him monopolists. The Supreme Court has expressly held that the offense of monopoly under Section 2 of the Sherman

Act has two elements: "(1) the possession of monoply power in the relevant market and (2) the willful acquisition or maintenance of that power as distinquished from growth or development as a consequence of a superior product, business acumen or historic accident." United States v. Grinnell Corporation, 384 U.S. 563, 570-71 (1966). Generally, as stated in Summery v. Ford Motor Credit Company, 449 F.Supp. 132, 137 (D.S.C. 1976), the terms "restraint of trade" and "monopolization" as used in the Sherman Act "encompass only practices which are principally intended or designed to restrict free and open competition in the marketplace." Assuming arguendo that the Martindale-Hubbell Directory is the most prominent and widely-recognized

listing of attorneys, the court finds no evidence that this market position was unlawfully attained or has been unlawfully maintained by defendant Martindale.[11] See generally Dougherty v. Continental Oil & Company, 579 F.2d 954, 962 (4th Cir. 1978).

Plaintiff has not only neglected to define the target market, but he has totally failed to allege any unlawful actions which defendant Martindale has taken to achieve its enviable market position. Put simply, plaintiff would have the court find that once a publisher achhieves a commanding position in the relevant market, he may

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11. Hester has not alleged and the court detects no evidence that Martindale-Hubbell has acted to prevent other law lists and legal directories from establishing and identical rating system and publication format.

no longer adhere to uniform policies restristing the clients with whom he will deal. Such a conclusion is directly at variance with the letter and intent of the Sherman Act. Finding no evidence of an intent to monopolize within the meaning of the Sherman Act on the part of Martindale-Hubbell, the ABA or the North Carolina State Bar, Count 2 is dismissed.

COUNT 3

In this count, Hester complains that Martindale-Hubbell "in combination, consipiracy, contract, or concert with defendant American Bar Association, planned, directed, controlled, published and distributed the Martindale-Hubbell Law Directory. . . .in a form and manner and with contents which restrained trade or commerce within the State of North

Carolina. . . . " (Plaintiff's Complaint (27.) All of these actions were allegedly taken in violation of N.C.G.S. Section 75-1.[12]

As noted by the Supreme Court of North Caroina, Section 75-1 "was based upon section one of the Sherman Act. . ." and "the body of law applying the Sherman Act, although not binding upon this court in applyint G.S. Section 75-1, is nonetheless instructive in determining the full reach of that statute." Rose v. Vulcan Materials Company, 194 S.E.2d 521, 530 (1973). See also Nash City Board of Education

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12. N.C.G.S. Section 75-1 (1975 Repl. Vol.) provides in relevant part: "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal."

v. Biltmore Company, 464 F.Supp. 1027 (E.D.N.C. 1978). Having previously found no facts supporting a conspiracy or concerted activity in restraint of trade and in violation of the Sherman Act, the court similarly finds no facts supporting a violatin of N.C.G.S. Sectioion 75-1.

COUNT 4

Hester next alleges defendants Martindale-Hubbell and the ABA have violated N.C.G.S. Section 75-1.1[13] by engaging in unfair or deceptive practices in the control, publication and distribution of the Martindale Directory. In light of the court's previous findings that (1) there is no evidence of a conspiracy between the defendnats, and (2) Martindale-Hubbell has acted within its unilateral right to

establish uniform publication policies, the allegations of Count 4 are likewise without merit and are dismissed.

COUNTS 5 AND 6

According to Hester, the North Carolina State Bar has cooperated in and condoned the alleged discrimination against him by the adoption and enforcement of DR2-102 of the Code of Professional Responsibility. In addition, plaintiff claims the North Carolina State Bar has refused to consider his complaints with respect to the selling of advertising in the biiographical section of the Martindale Directory. These actions allegedly

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13. N.C.G.S. Section 75-1.1 (1979 Cum. Supp.) provides in relevant part: "(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

infringe Hester's rights guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 19, of the Constitution of North Carolina. Hester prays for injunctive and declaratory relief from the North Carolina State Bar. Specifically he requests the court to declare DR2-102(A)(6) in violation of the Fourteenth Amendment and to direct the North Carolina State Bar to evaluate the merits of his complaint against Martindale-Hubbell. The court has noted that DR2-102 was amended subsequent to the filing of this action and the certification process of which plaintiff complains was abolished. Consequently, the request for declaratory relief is moot.

Regarding plaintiff's allegation that the North Carolina State Bar refused to consider his complaint, a letter attached to the complaint as Exhibit J explains the State Bar's position. After Hester's complaint was considered by the council and the ethics committee, Secretary James informed him that his complaint would properly lay before the ABA and not the North Carolina State Bar. Id. Plaintiff's conclusory allegation of a violation of his constitutional rights is unsupported by the record and is dismissed.

CONCLUSION

The court is acutely aware that summary judgment should be used sparingly in complex antitrust litigation. Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962).

However, Rule 56 should not "be read out of antitrust cases," First National Bank v. Cities Service, 391 U.S. 253, 289 (1968), and "the question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case. . . ." Id. at 259. See Tripoli Company v. Wella Corporation, 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970). The court has determined that the present action is an appropriate one for the exercise of summary procedures, and accordingly it is now

ORDERED that:

1. Defendant Martindale-Hubbell, Inc.'s motion for summary judgment be allowed;

2. The motion of defendant North Carolina State Bar for summary judgment be allowed, and

3. The action dismissed, with prejudice, as to defendant American Bar Association.

F. T. Dupree, Jr.
U.S. District Judge

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
CIVIL ACTION FILE NO.
76-48-CIV-5

OMA H. HESTER, JR.	)	
	)	
vs.	)	JUDGMENT
	)	
MARTINDALE-HUBBELL, Inc., AMERICAN BAR ASSOCIATION and NORTH CAROLINA STATE BAR	)	

This action came on for hearing before the Court, Honorable F.T.Dupree, Jr., United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that defendant Martindale-Hubbell, Inc.'s motion for summary judgment be allowed, and the action against the ABA is

dismissed sua sponte. This action is hereby dismissed.

Copies mailed to:

Noel Lee Allen
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Raleigh, NC 27602

Mr. W.F. Womble
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Winston Salem, NC

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P.O. Box 25850
Raleigh, NC 27611

Mr. John V. Hunter
P.O. Box 448
Raleigh, NC 27602

Dated at Raleigh, North Carolina
this the 30th day of May, 1980.

_____
J. Rich Leonard
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1481

Oma H. Hester, Jr.,
Appellant,

versus

Martindale-Hubbell, Inc.;
American Bar Association
and North Carolina State Bar,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued January 5, 1981.
Decided September 16, 1981

Before WINTER, Chief Judge, RUSSELL and PHILLIPS, Circuit Judges.

Noel Lee Allen (Barringer, Allen and Pinnix on brief) for Appellant; Allan R. Gitter (William F. Womble on brief) for Appellee Martindale-Hubbell, Inc., John V. Huntrer, III for Appelle American Bar Association (H. D. Coley, Jr. on brief) for Appellee North Carolina State Bar.

PHILLIPS, Circuit Judge:

Oma H. Hester, a North Carolina attorney, appeals the grant by summary judgment dismissing his several claims of violations by Martindale-Hubbell, Inc., the American Bar Association (ABA) and the North Carolina State Bar (State Bar) of rights secured to him by the federal constitution and federal and state antitrust statutes in connection with his unsuccessful attempt to advertise in Martindale-Hubbell's general legal directory. Essentially for reasons stated by the district court, we affirm.

I

The facts, as presented to the district court on the summary judgment record, were that the State Bar, with the approval of the North Caroliina Supreme Court, had promulgated the North

Carolina Code of Professional Responsibility, the provisions of which were supstantially identical to the American Bar Association's Code of Professional Responsibility. At the time the actions that are the subject of this suit took place in late 1973 and early 1974, DR 2-102(A) (6) of the North Carolina Code provided that an attorney could present brief biographical and other specified information in a reputable law list or legal directory and "[a] law list or any directory is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards."*

From the late 1930's until February 1978, the ABA maintained a Standing Committee on Law Lists (Committee) that

promulgated rules and standards with which a law list publisher could coomply and receive certification by the Committee. Rule and Standard 4 promulgated by the Committee provided that "[t]he publisher of a law list which has received a certificate of compliance may rate its listees in a manner not disapproved of by the Committee," and the Committee also published five rulings to serve as guidelines for any publisher who wished to establish a rating system.

From the inception of this private regulatory scheme, Martindale-Hubbell voluntarily submitted to a review of its publication practices by the Committee and each year received a certificate of compliance from the Committee. In 1977, Martindale-Hubbell's Legal Directory was

listed as one of sixty law lists certified to be reputable by the Committee. It was, however, the only one listed in the category of "general legal directory."

The Martindale-Hubbell Law Directory is divided into two sections. In the geographical section, Martindale-Hubbell undertakes to list without charge the name of every lawyer, law firm and professional corporation in the United States. In addition to the lawyer's name, these individual alphabetical listings include, in a coded

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* DR2-102 (A) (6) was amended in 1978 to delete the reference to certification by the ABA. Thus, the only standard that remains for establishing the reputability of a law list is the statement in the rule that "[a] law list or any directory is not

> reputable if its management or contents are likely to be misleading or injurious to the public or to the profession." DR2-102 (A) (5).

format in fine print, information such as years of birth and admission to the bar, colege and law school attended, address, and firm connection or corporate or government employment. Ratings, based upon a system approved by the Committee, are also included with a large number of the individual and firm listings.

The second section of the directory is a biographical one in which lawyers may pay to have published advertisements that are euphemistically referred to by Martindale-Hubbell as "professional cards." These "professional cards" appear in boldface print and may include a broad array of biographical data in

addition to that found in the geographical section together with information about areas of practice, references and representative clients. In order to subscribe to publication of a "professional card" in the biographical section, however, an attorney must have received a certain rating under Martindale-Hubbell's system or be associated with a firm that has obtained that distinction.

In August 1973, Hester requested information from Martindale-Hubbell concerning publication of a "professional card" in Martindale-Hubbell's 1974 edition. The publisher refused to supply this information to Hester, however, because he was ineligible to have a "professional card"

published in the directory inasmuch as he had not yet received a rating.

Hester then addressed letters of formal complaint to the State Bar and the ABA in which he alleged that the management and contents of the Martindale-Hubbell Law Directory were in violation of DR2-102 (A) (6). The State Bar responded that, since the ABA had issued a certificate of compliance to Martindale-Hubbell, Hester's complaint was one properly directed to that organization. Hester subsequently received a reply form the Committee stating that Martindale-Hubbell had in no way violated the Committee's rules and standards for law lists in refusing to publish Hester's "professional card." Hester then filed the present suit.

In the first count of his complaint Hester alleged that, by effectively sanctioning Martindale-Hubbell's refusal to publish his "professional card" in the biographical section of its directory, the ABA and the State Bar combined with Martindale-Hubbell to exclude Hester from the market for this form of legal advertising in violation of section 1 of the Sherman Act, 15 U.S.C. Section 1. In a second count he alleged that Martindale-Hubbell, with the cooperation of the ABA, monopolized or attempted to monopolize the market for advertising in legal directories of Martindale-Hubbell's comprehensiveness and scope of distribution in violation of section 2 of the Sherman Act, 15 U.S.C. Section 2.

In third and fourth counts, incorporating by reference the allegations of concerted anticompetitive activity, Hester alleged that this activity also constituted a violation of N.C. Gen. Stat. Section 75-1, the North Carolina analogue of the Sherman Act, and of N.C. Gen. Stat. Section 75-1.1, the North Carolina analogue of section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45. Finally, in counts five and six of the complaint Hester alleged that the State Bar, by condoning the allegedly discriminatory refusal of Martindale-Hubbell to publish his "professional card" and refusing to consider his complaint against that publisher, had violated his rights to equal protection and due process of law under the fourteenth amendment to the

United States Constitution and article 1, section 19 of the North Carolina Constitution.

Following two years of discovery in which Hester received responses to his interrogatories, requests for admissions and requests for production of documents from all three defendants, Martindale-Hubbell and the State Bar moved for summary judgment. Upon review of the summary judgment record, a magistrate recommended denial of the motions. The district court, however, rejected this recommendation, granted the motions and, sua sponte, dismissed the claims against the ABA.

In a thorough memeorandum opinion the court concluded that Hester could not succeed on his allegation of a violation of section 1 of the Sherman

Act because he had failed to present sufficient evidence of a conspiracy or concerted activity. Hester v. Martindale-Hubbell, Inc., 493 F. Supp. 335, 337-40 (E.D.N.C. 1980). Turning to Hester's allegation that Martindale-Hubbell was a monopolist in violation of section 2 of the Sherman Act, the court concluded that on the record presented Martindale-Hubbell had not unlawfully attained or maintained any monopoly position it might have acquired. Id. at 340-41. Having found no evidence showing concerted activity in restraint of trade in violation of the Sherman Act, the court also rejected Hester's claims under N.C. Gen. Stat. Sections 75-1 and 75-1.1. Id. at 341. Finally, the district court rejected as moot Hester's prayer for injunctive and

declaratory relief declaring DR2-102(A)(6) violative of the United States and North Carolina Constitutions and ordering the State Bar to consider his complaint because that disciplinary rule had since been amended to abolish the certification process of which Hester complained. Id. at 341-42.

II

We agree with the district court's ultimate disposition of Hester's claims and, with one exception, with the reasoning the district court used to reach that result. We think that Hester's claim of an illegal combination in restraint of trade between the three defendants failed on a basis other than that essentially relied upon by the district court.

In rejecting this claim the district court relied primarily on the Supreme Court's decision in Albrecht v. Herald Co., 390 U.S. 145 (1968), and the Third Circuit's later analysis of Albrecht in Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978). We think that those cases, however, are inapposite. In both Albrecht and Harold Friedman, Inc., an express agreement was conceded, and the question was whether that agreement was incidental or essential to a restraint of trade. In the present case, on the other hand, there was clearly a restraint of trade in the form of restricted access to advertising, and the dispositive question presenting on the summary judgment record was whether that restraint was the result of the

concerted activity of the ABA, the State Bar and Martindale-Hubbell or merely the unilateral action of Martindale-Hubbell. We hold that the requisite concerted actively was not established on the record presented.

Both the Supreme Court, see United States v. Colgate Co., 250 U.S. 300 (1919), and much more recently this court, see Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476, 483 (4th Cir. 1980), have recognized, in considering antitrust claims, that a business may unilaterally choose those with whom it will conduct business. Courts considering claims of violations of the antitrust laws, of course, must be "sensitive to the realities of the marketplace," id. at 481, and

therefore have extended the concept of concerted activity far beyond the classic case of an actual agreement to engage in a common course of conduct. But we are satisfied that this case, as presented for decision on the summary judgment record, lies beyond the pale of even the most liberal extension of the concept of concerted activity.

This is not a case in which those at a lower level of competition have conspired to force a supplier at a higher level of competition to impose some restraint. See, e.g., United States v. General Motors Corp., 384 U.S. 127 (1966). Nor is it a case in which a supplier at a higher level of competition has coerced those at a lower level of competition to acquiesce in some anticompetitive endeavor. See,

e.g., United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

Instead, Hester's proferred proof shows at best only that the State Bar and the ABA had undertaken to establish standards and rules for certain aspects of law list publishing and had discouraged attorneys from listing themselves with those publishers who did not comply with those rules and standards, that the ABA had established guidelines for the rating of lawyers by law lists and that Martindale-Hubbell had complied with those guidelines and had accordingly received a certificate of compliance from the ABA. There was no showing on the record, nor was it ever alleged, however, that the ABA required, or even suggested, that Martindale-Hubbell condition the right

to advertise in its publication on the atainment of a certain rating, which was the restraint of trade alleged in this case. Thus, at best, Hester's profered proof established only that the ABA and the State Bar did not prevent Martindale-Hubbell from refusing to publish his advertisement when they arguably had the influence to do so. Such evidence simply does not show a concerted refusal to deal within contemplation of the laws invoked.

Affirmed."

WINTER, Chief Judge, concurring and dissenting:

In my view, the majority applies too narrow a definition of "concerted activity" to the facts of this case. I would conclude that the district court erred in granting summary judgment for defendants on Hester's claims under Section 1 of the Sherman Act. From the majority's conclusion to the contrary, I respectfully dissent.[1]

I.

As the majority points out, it is plain that Martindale-Hubbell's respective advertising policies result in a

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1. Because N. C. Gen. Stat. Section 75-1 is the state equivalent of Sherman Act Section 1, I would reverse the dismissal of Hester's claim under that section as well. I concur in the majority's decision to affirm summary judgment for defendants with

restraint of trade. The impact of that restraint on Mr. Hester and others in similar positions is self-evident. Martindal-Hubbell is the only general legal directory in the nation and the only law list of any kind that published ratings of listed lawyers. Its preeminence as a tool in securing legal services in distant places and in referring legal business to out-of-town lawyers is well-known among legal practitioners. Under current advertising policies, Martindale-Hubbell denies Hester and others a chance to list their names and certain other data in its widely-used Biographical Section, relegation their listings to the relative obscurity of the fine print in its Geographical Section.

The exclusion of Hester and others results from Martindale-Hubbell's system of "rating" attorneys. In order to purchase a listing in the Biographical Section, an attorney must receive an "av" or a "bv" rating or practice in association with a firm which has received such a rating. A lawyer must practice at lease five years to receive a "bv" rating and ten years to receive and "av." To determine an attorney's rating, Martindale-Hubbell solicits assessments of the legal skills, industry and trustworthiness of individual lawyers by addressing questionnaires to judges and attorneys in the local area where the individual practices.

There can be no doubt that the impact of this policy is to lessen

competition. Long-established firms receive listings not only for their more experienced lawyers but for their newest associates as well. Those lawyers who have practiced at least five years and who are sufficiently regarded by their professional colleagues are given the privilege of effective advertising with the consequence of increasing their business. The young solo practitioner, the experienced lawyer beginning to practice in a new locality even after years of experience elsewhere, [2] and the maverick who has forfeited an objective appraisal of his

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2.Hester fits in this category himself. He graduated from law school in 1950, but served as a lawyer in the armed services until 1972. Even had he been in private practice else-

qualifications by his colleagues are denied this opportunity. The policy thus permits established firms and lawyers to increase their competitive advantage and compounds the already difficult task of new entrants seeking to sell their services in local markets.

II.

Despite the obvious restraint of trade which results from Martindale-Hubbell's advertising policy, the majority finds that policy beyond the reach of Section 1 of the Sherman Act because it represents a unilateral decision on th part of Martindale-Hubbell and does not result from

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(2. con't) where before moving to Hickory, North Carolina, Hester would have been excluded. Under Martindale-Hubbell's policy,ratings are not automatically transferable from one locality to another.

unlawful concerted activity. I believe the majority errs by applying a definition of "concerted activity" considerably narrower than that approved by the Supreme Court in Albrecht v. The Herald Co., 390 U.S. 145 (1968), the Court's most recent treatment of this issue.

The majority finds no evidence of concerted activity because there is no showing that "the ABA required, or even suggested, that Martindale-Hubbell condition the right to advertise in its publication on the attainment of a certain rating." Slip Op. at 10, Under Albrecht, a newspaper publisher required its independent distributors to sell its papers at a price no higher than it suggessted. When Albrecht, one of its distributors, raised his prices,

the publisher hired Milne Circulation Sales, Inc. to undertake a telephone solicitation campaign designed to convince Albrecht's customers to switch to a new distributor, to deliver papers to customers who decided to remove themselved from Albrecht's route. Both Kroner and Milne were aware that the publisher sought to enforce its retail pricing policy.

The Supreme Court found illegal concerted activity in this combination, despite the fact the neither Kroner nor Milne "required" or "suggested" resale price maintenance or participated in any way in the formulation of the publisher's pricing policy. To establish concerted activity within the meaning of Sherman Act Section 1, it was sufficient that Kroner and Milne were

aware of the anticompetitive purpose of the publisher's scheme and that they "materially aided in the accomplishment" of its plan. 390 U.S. at 150.[3]

Under the Albrecht standard, there is in this case undisputed evidence of concerted activity. For decades before commencement of this suit, Martindale-Hubbell pursued an advertising policy with obvious anticompetitive effects. Because lawyers were forbidden by codes of ethics such as that promulgated by the North Carolina State Bar from

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3. This view of concerted activity was not new even with Albrecht. Eight years earlier, the Court had held that "an illegal combination to fix prices and sec;ures compliance by means in addition to the 'mere announcement of his policy and the simple refusal to deal.'"

advertising in other than "reputable" law lists, and because lists certified by the ABA were conclusively determined to be "reputable," approval by the ABA of the Martindale-Hubbell scheme was necessary to the very existence of the publication. [4] Although it possessed

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(3 cont.) Albrecht v. The Herald Co., 390 U.S. 145, 149 (1968), quoted United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960).

4. Martindale-Hubbell disputes this point, claiming that even without ABA certification it could prove itself to be "reputable" by showing that "its management [and] contents are [not] likely to be misleading or injurious to the public or to the profession." DR 2-102(A)(6). For all practical purposes, however, ABA certification was the only route to "reputability," before the 1978 amendments to DR 2-102 (A) (6) because a lawyer publishing in a

the power, as a practical matter, to require Martindale-Hubbell to change its advertising policy in any way it saw fit, and although it was undoubtedly aware of the anticompetitive impact of Martindale-Hubbell's policy for over forty years.

The ABA's support of Martindale's policy went beyond its annual certificaton. The ABA Committee on Ethics issued Informal Opinion 55 which permits attorneys to respond to questions asked by a law list publisher in the course of rating other attorneys. Because Martindale-Hubbell has long been the only list publishing ratings of

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(4. cont.) non-certified list would take the chance of its later being found not "reputable." It is probably for this reason that no non-ABA sanctioned list was ever published before this lawsuit.

listed lawyers, the ABA must have issued Informal Opinion 55 with the specific intention of facilitating the very practices Hester now challenges as a restraint of trade.

In the language of Albrecht, the ABA in my view, "materially aided" Martindale-Hubbell in pursuing a policy with known anticompetitive effects, by providing the annual certification necessary to the continued existence of that policy and by granting the approval necessary for lawyers to participate in the rating of their competitors. Under the alternative formulation of United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960), Martindale-Hubbell maintained its restrictive policy by means in addition to the "mere announcement of [the] policy and the simple

refusal to deal." It maintained its exclusionary policy by seeking and receiving approval of that policy and assistance in carrying it out from the ABA, whose practical power to control attorney advertising made it an indispensable partner in the venture. This symbiotic relationship betweeen the ABA and Martindale-Hubbell offers a classic example of the danger which led Congress in 1890 to focus its attention on concerted actions in restraint of trade. By acting in concert, the parties created a restraint considerably more effective than that either could have created on its own.[5]

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5. Even under a more restrictive definition of "concerted activity," I would have serious reservations about affirming summary

(5 cont.) judgment on the Setion 1 claim. Actual agreements to (5 cont.) restrain trade are seldon proved by direct evidence; more often they must be infetted from all the circumstances of a particular case. Drawing inferences favorable to Hester, a jury might find a illegal agreement in this case. There was certainly ample opportunity for conspiracy during the parties' forty-year course of dealing. The ABA regularly dispatched representatives to Martindale-Hubbell's offices to inspect the operation of its rating system. The record discloses at least one instance where a Martindale-Hubbell vice president attended the annual meeting of the Standing Committee on Law Lists. In additon, one could conclude that the ABA had a motive to promote the restraint alleged, since it favors the very practitioners who hold most positions of power and influence in the ABA. In this regard, it is worth noting that all members of the Standing Committee at the time Hester first complained of Martindale-Hubbell's policies were lawyers whose names appeared in the Biographical Section of the directory.

To avoid the result Albrecht requires, defendants advance two related arguments. First, they contend, the ABA would have certified Martindale-Hubbell whether or not it pursued the restrictive policy challenged here. This contention cannot avail defendants, however, any more than it would have aided Milne Circulation Sales, Inc. to

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(5 cont) In addition, even if the district court was correct in finding no concerted action between Martindale-Hubbell and the ABA, it erred in dismissing sua sponte the Section 1 claim against the ABA. The ABA is itself a voluntary association of competitors. It need not join with any other party for its actions to constitute "concerted activity" within the meaning of the Sherman Act. See National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). To establish the liability of the ABA, it was sufficient to show that the Association knowingly undertook an action which had the effect of restraining competition.

point out that it would have solicited customers for The Herald whether for the purpose of punishing Albrecht or simply to increase circulation. What matter is that the ABA, like Milne, lent material assistance to a pursuit which it knew would result in a restraint of trade.

Second, in what is really a restatement of the same argument, defendants suggest that ABA certification of Martindale-Hubbell represents only a general approval of the publication as "reputable," and in no way reflects the ABA's judgment as to the exclusionary advertising policy.Even if this argument made any difference under the Albrecht rationale, I would find that the record fails to support

the contention as a factual matter. In fact, ABA approval of Martindale represents much more than a generalized assessment that the publication is "reputable." In 1941, the Standing Committee on Law Lists promulgated a series of specific Rules and Standards which it has since applied in certifying law lists. Among other things, those rules prohibit the giving of "preferential prominence. . . to the name of any listed attorney or attorneys, by different size or character or type. . . . " Rule and Standard 3. That rule, on its face, would appear to prohibit the very practice challenged here: the printing of selected names in larger print in a Biographical Section while others are listed in smaller print in the

Geographical Section. Because the rules also permit the printing of "professional cards" in a Biographical Section of a law list, Rule and Standard 3 has apparently been interpreted to permit Martindale-Hubbell's practice. Regardless of the correctness of that interpretation, the fact remains that in order to certify Martindale-Hubbell, ABA representatives had to consider and approve the specific restraint challenged in this lawsuit.

III.

In concluding that the facts of this case would permit the conclusion that the requisite concerted activity to constitute an antitrust violation was present and thus summary judgment for defendants was in error, I am constrained to add that this conclusion

reflects nothing regarding the possible motives of the defendants. Whether Martindale-Hubbell or the ABA actually desired to restrain competition among lawyers, or whether they sought only to uphold professional standards and protect the public from deceptive advertising, the antitrust inquiry is the same. Defendants would violate Section 1 by knowingly engaging in concerted activity which has the effect of restraining competition, even though the motive behind the action may have borne no relation to competition or may have wholly altruistic. See, National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Silver v. New York Stock Exchange, 373 U. S. 341, 347 (1963).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

September 16, 1981

TO: W. F. Womble
Allen R. Gitter
John V. Hunter, III
H. D. Coley, Jr.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 80-1481 this date.

* * * * * * * * * * * * * * * * *

WILLIAM K. SLATE, II

CLERK

MEMORANDUM TO THE RATING DEPARTMENT

RE: Oma H. Hester, Jr. '25 '50
Hickory, North Carolina

For the reasons indicated below, please reopen the above lawyer's 1974 file dating it for completion no later than October 1st.

Seconds should be sent to another 8 or 10 reporters in Hickory if available, otherwise, in other places in that or nearby counties.

The reason for this further work is the receipt of his letter of August 23rd, jurisdiction of which I took over from Mr. Healey and called Mr. Hester on the telephone.

I opened by saying that I was responding to his letter of the 23rd and wanted to provide the additional information that he wanted and I went on to say that for more than 50 years we

have had certain eligibility requirements for publishing a professional card, which now are the "av", "bv" or "cv" rating. I added that the appropriate unit of the American Bar Association is aware of that and we have received the necessary approval for our procedures and I felt that the North Carolina Bar was aware of our procedures too.

I did not mention the Law Lists Committee but did say that advertisements for professional cards were approved by old Cannon 27 and currently by the sanction of the corresponding page in the Code of Professional Responsibility.

He said that at this time he did not wish to pursue a discussion regarding the propriety of advertising

but was interested in knowing what our criteria was without questioning the validity thereof.

I again mentioned the ratings and said that when an application is received from a lawyer or firm not then eligible, we undertake the necessary investigation and we would of course do so in his case. I said that normally the reporting sources, other lawyers and members of the Judiciary, at a place the size of Hickory were selected at random but if he wanted to give me the names of some such individuals, I would be sure the inquiries would be directed to them. He said that he did not feel that was necessary and was satisfied to have us follow our usual procedures.

He said that he did want to know however, if a decision with respect to

meeting our eligibility requirements would be made in time for our 1974 Edition. I told him that it would be, as the North Carolina Section would not be closing until well into October. This seemed to satisfy him and we ended the conversation by my saying that I would get back to him in due course.

(s) William Hildebrand, Jr.

WH:cs

Date August 29, 1973

December 20, 1973

Oma H. Hester, Jr., Esquire
P.O. Box 2882
Hickory, North Carolina 28601

Dear Mr. Hester:

Your letter of December 9, 1973 to Chesterfield Smith, President of the American Bar Association, has been referred to me, as Staff Director for the Standing Committee on Law Lists, for response.

This Committee exists because of an exception to the fundmental principle that it is unethical for lawyers to advertise. Disciplinary Rule 2-102(A)(6) of the Code of Professional Responsibility permits the listing of biographical and other informative data in a reputable law list. The use of law

lists as approved media for informing the public, particularly forwarders of legal matters, of the lawyer's availability for professional employment is the intended scope of the law list exception.

Enclosed is a copy of the article entitled "Ethical Advertising and Solicitation: Law Lists", and a copy of the Code of Professional Respnsibility. The complete text of DR 2-102(A)(6) is given on pages 7 and 8 of the pamphlet.

A statement of the Rules and Standards for Law Lists (adopted by the House of Delegates in 1937) are included on page 54 of the pamphlet. In particular note Rule 4:

> "The pubilsher of a law list which has received a certificate of compliance from the committee may rate its listees in a manner not disapproved of by the committee."

The Martindale-Hubbell Law Directory is the only law list that publishes ratings of listed lawyers. You may wish to refer to the enclosed "Confidential Rating Explanation" in which the rating system of the publisher is summarized.

Your correspondence is being sent to Oscar Fendler, Chariman of this Committee, for information. I am also sending a copy of your letter to Williamm Hildebrand, Jr., Vice-President of the publishing company, for his comments.

This matter will be considered at the next Committee meeting to be held on January 11-13, 1974. You man expect to hear from this office at that time.

Very truly yours,

/s/ C. Russell Twist
Staff Director
[ABA Standing Committee on Law Lists]

* * *

Rule and Standard 4

> "The publisher of a law list which has received a certificate of compliance from the Committee may rate its listees in a manner not disapproved of by the Committee."[1]

Ratings are not included in the list of data permitted to be published in a law list under DR 2-102(A)(6). However, Rule and Standard 4 expressly permits the publishers of law lists for which a certificate of compliance has been issued to rate the lawyers listed therein.[2]

The Committee on Law Lists has

> 1. Proposed Revision The publisher of a law list which has received a certificate of compliance from the Committee may rate its listees in a manner not desapproved by the Committee.
>
> 2. Canon 27 of the former Canons of Ethics, as amended in 1940, permitted the listing of "such other information as the Rules and Standards as to Law Lists permit". However, this language was deleted from the 1942 amendments to Canon 27. (See American Bar Association, Opinions on

jurisdiction to determine what elements may proper enter into rating.[3] The Committee has set up equitable rules concerning rating procedures to which the publisher must conform in order to obtain ABA approval. The publisher must demonstrate that his rating system is a fair and impartial one and that it will be conducted honestly and intelligently, using due care in arriving at conclusions.[3]

The Committee also has jurisdiction to investigate complaints. When necessary, a formal hearing is held concerning a specific protest or complaint made by a lawyer, to determine whether the rating has been made fairly and impartially, in accordance with Rule and Standard 4.[4] A rating will not be upheld when it is so clearly unsupported by the facts as to constitute improper conduct by the publisher.[5]

(2 cont.) Professional Ethics, 1967 ed. pp. 74-77.)

3. Committee on Law Lists, Minutes, June 1943, p. 14. Committee Report February 1943.

4. Committee on Law Lists, Minutes, June 1943, p. 14.

5. Committee on Law Lists, Minutes, August 1969, p. 31.

Committee Rulings

4.1. Rating/Publishers

A publisher who rates lawyers must base the rating of ability upon a careful, adequate and thorough investigation reasonably and impartially made.

Committee on Ethics, Informal Opinion 171 (former Interpretation 2)

4.2.

A publisher may not adopt a system of rating lawyers, unless that system has been submitted to, and approved to, and approved by, the Committee.

Committee on Law Lists, February 1943 (former Interpretation 1)

4-3.

A publisher may not change the system used in rating lawyers, unless the proposed change has been submitted to, and approved by, the Committee.

Committee on Law Lists, February 1943 (former Interpretation 3)

4.4.

An attorney may properly answer questions by a law list publisher as to the proper rating of other lawyers.

Committee on Ethics Informal Opinion 55 4.5.

A lawyer may give data to a law list to enable it to rate him.

Committee on Ethics Informal Opinion 165

October 14, 1974

Oma H. Hester, Jr., Esquire
P.O. Box 2882
Hickory, North Carolina 28601

Dear Mr. Hester:

This is in reference to your past correspondence with Chesterfield Smith, Past President of the Association and C. Russell Twist, Staff Director for this Committee. I am writing to you in my capacity as Chariman of the Standing Committee on Law Lists regarding your objection to the selected publication of professional cards in the Martindale-Hubbell Law Directory.

You contend that the publication of professional cards in the Directory is in direct violation of Canon 2 of the Code of Professional Responsibility. As Mr. Twist advised you in his letter of

December 20, 1973, Disciplinary Rule 2-102(A)(6) permits the publication of biographical and other informative data in a reputable law list. The Committee has annually examined the Martindale-Hubbell Law Direcotry and has issued a certificate of compliance may be treated as evidence that the law list has been published in compliance with the provisions of the Code of Professional Responsibility and the Rules and Standards for Law Lists.

In reviewing your correspondence and that of Martindale-Hubbell, Inc. at the January and June 1974 meetings, the Committee has determined that the Rules and Standards have not been violated by the publisher in not offering a professional card to you. The publisher's criteria for listing are

predicated on its rating system, which has not been disapproved by the Committee. The matter of a rating system by a law list publisher has been covered in the following unpublished Informal Opinions of the Association's Ethics Committee:

> "An attorney may properly answer questions by a law list publisher as to the proper rating of other lawyers." (IO 55)
>
> "A lawyer may give to a law list data to enable it to rate him." (IO 165)
>
> "Proper considerations for listing by the publisher of a law list are legal ability, character, financial worth, and promptness in discharging obligations." (IO 171)

The Committee has been advised by William Hildebrand, Jr., Vice President of Martindale-Hubbell, Inc. that your file indicates at this time that you are not eligible for listing in the

Directory mainly because you are relatively unknown among the "reporting sources" in the Hickory area. It has been suggested by Mr. Hildebrand that you may submit a list of your own referenced for use by the publisher.

I heartily recommend that you avail yourself of this opportunity to submit your own references.

Very truly yours,

/s/ George B. Powers
Chairman
[ABA Standing Committee on Law Lists]

GBP:blm
cc: Chesterfield Smith, Esquire
William Hildebrand, Jr., Esquire

Reprinted from American Bar Association Journal February, 1967 Vol. 53

ETHICAL ADVERTISING AND SOLICITATION: LAW LISTS

* * * *

Canon 27 of the Canons of Professional Ethics of the American Bar Association is entitled "Advertising, Direct or Indirect", and although there are forty-seven canons, more than one third of the opinions of the American Bar Association's Standing Committee on Professional Ethics have involved Canon 27.[1] The legal profession obviously has taken a lively interest in what constitutes direct or indirect advertising, which is prohibited, and what constitutes ethical advertising and solicitation, which may be summmarized in the two words - - "law lists".

The first paragraph of Canon 27 now reads:

"It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engated or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible;

but the customary use of simple professional cards is not improper." However, the only place in which a lawyer may publish his "simple professional card" is in a reputable law list.

HOW DOES A LAWYER KNOW A "REPUTABLE LAW LIST?

First, what is a law list? It has a precise definition.

Every list of attorneys at law, legal directory or other instrumentality maintained or published primarily for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available

for professional employment, shall be deemed a law list.

Obviously the key words are "presting...any attorney...as probably available for professional employment".

Second, what is a reputable law list? Canon 27 gives lawyers an exceedingly simple guide:

A certificate of compliance with the Rules and Standards issued by the Standing Committee on Law Lists may be treated as evidence that such list is reputable.

Most law list publishers holding a certificate of compliance display a full and complete copy of the certificate in

the specific edition for which the certificate is issued. The certificate which is reproduced on one of the first pages of the list, reads as follows:

The Standing Committee on Law Lists of the American Bar Association hereby certifies that in publishing the names of attorneys at law in the United States in the [month and year] edition of [name of publication]. You as publisher have complied with the Rules and Standards as to Law Lists of the Association. The Commitee has not passes upon any other aspect of the publication.

In addition, the Committee on Law Lists releases near the end of each year a roster of law lists and legal directories the publishers of which have

received certificates of compliance for their editions to be published in the following year. This roster is published annually in the American Bar Association Journal, as well as in several other publications, and approximately 4,000 copies of each roster are distributed to all local and state bar presidents and secretaries, daily, legal newspapers and bar periodicals, approved law school libraries, officers and members of the board of Governors of the Association, a selected list of committees and individuals and to any person who specifically requests the roster. Anyone who wishes a current roster may have one simply by sending a request to the Standing Committee on Law Lists,

American Bar Center, 1155 East 60th Street, Chicago, Ilinois 60637.

Canon 43 fo the Canons of Professional Ethics contains the following prohibitory language.

It is improper for a lawyer to permit his name to be published in a law list the conduct, management or contents of which are calculated or likely tio deceive or injure the public or the profession, or to lower the dignity or standing of the profession.

Thus, the publication by a lawyer of his "professional card" in any place other than in a reputable law list is a violation of both Canons 27 and 43, and he must prevent the use of his

"professional card" in any other place.

* * * * *

BECOMING LISTED IN A REPUTABLE LAW LIST

At present the Law Lists Committee has issued certificates of compliance to the publisdhers of fifty-nine reputable law lists in the following categories: one general legal directory (Martindale-Hubbell), twenty-three state and local legal directories (all published by Legal Directories Publishing Company), twelve general law lists, thirteen commercial law lists, four insurance law lists, two probate law lists and four foreign law lists.

It is ethical and proper for lawyers to pay to have their names and the specified biographical data published in and distributed through these reputable

law lists, which frankly present the listed lawyers "as probably available for professional employment".

How does a lawyer procure his listing in any particular list? The directories list the names of substantially all of the attorneys admitted to practice in the area covered by the directory, the only exceptions being lawyers whose names or addresses are unkown to the publisher or those who have expressed a desire not to be included. **The Martindale-Hubbell Law Directory is the only directory in which are listed sub-stantially all of the lawyers in the United States and the only law list for which a certificate is held in which lawyers are rated.** [Emphasis added]. In the twenty-three state and local

legal directories are listed substantially all of the lawyers in the states or areas which they cover. If a lawyer's name does not appear in such a directory, he need only advise the publisher and it will be included.

The publishers of law lists other than the directories publish listings on a selective basis. The standards upon which lawyers are selected for inclusion, the relation between the law list and the selected listees and the whole range of administrative problems flowing from the law list exception to the fundamental principle that it is unethical for lawyers to advertise for or to solicit professional employment are within the jurisdictional province of the Law Lists Committee.

THE STANDING COMMITTEE
ON LAW LISTS.

Although law lists have been published in the United States since approximately 1870, the Committee on Law Lists has existed only since.

The five-member Committee investigates annually at the expense and request of the publishers of law lists whether the law lists comply with and the publishers are adhering to the prescribed rules and standards. The Committee reviews each annual edition of each list and determines whether the publisher is entitled to a certificate of compliance; it determines upon application of the publisher whether a list of names of lawyers is or is not a law list; it hears complaints made by lawyers or laymen against law lists and complaints made by one law list publisher against

another; and it interprets and applies the Rules and Standards and the opinions of the Committee on Professional Ethics to determine what information may be included in biographical listings and whether the Canons of Professional Ethics have been violated. The Committee also procures information regarding law lists and reports it to the American Bar Association; it recommends changes in the rules and standards for law lists in the interest of the public and the members of the profession; and, most important, it endeavors to protect the public and members of the profession from dishonest, fraudulent or unworthy conduct of persons who represent, or claim to represent, law list publishers.

February 15, 1972

Major Oma H. Hester, Jr.
BOQ Bldg. 313, Box 12
Grissom AFB, Indiana 46970

Dear Major Hester:

Thank you for your letter of February 10th regarding your listing in the Directory. In accordance with information you furnished in July of 1970, your name and data, including the symbol denoting your military status, appears in the roster of the Hickory, North Carolina Bar.

The 1972 Edition, just published, is priced at $85 for the complete five volume set, including delivery charges. Your interest in professional representation in the Biographical Section is greatly appreciated, but since these cards are published only for qualified

lawyers and firms who subscribe and who are engaged in active practice, you would not be eligible as long as you are in the Armed Forces. If at some future time you should enter private practice, we would be very happy to have our Field Representative get in touch with you to give you more details regarding our subscription arrangements and requirements for publishing a card.

With our best wishes,

Sincerely yours,

Martindale-Hubbell, Inc.

/s/ Ruth M. Johnston

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA RALEIGH DIVISION

Civil Action Nol 76-0048-CIV-5

OMA H. HESTER, JR., Plaintiff	)	
v.	)	AFFIDAVIT
MARTINDALE-HUBBELL, INC.; AMERICAN BAR ASSOCIATION; and NORTH CAROLINA STATE BAR, Defendants	)	

Robert I. de Sherbinin being first duly sworn, deposes and says that he is a Vice President of Martindale-Hubbell, Inc. and for 12 years prior to January 1, 1977 had been the Manager of the Rating Department; that he is thoroughly familiar with the company's Directory and its rating system; and that the following facts are true to the best of his knowledge and belief:

* * * * *

Martindale-Hubbell has acted on its own, unilateraly, in developing its standards, practices and procedures and

acted in combination, conspiracy, or concert nor under any contract, agreement or understanding with the American Bar Association, the North Caroliina State Bar, or any other person, firm, association, organization or corporation. As hereinabove indicated, and as was required of all publishers of law lists and legal directories under the Code of Professional Responsibility adopted by the American Bar Association, the North Carolina State Bar and the Bars of other states. Martindale-Hubbell annually applied for and obtained from the American Bar Association a certificate that in publishing the Martindale-Hubbell Law Directory it had complied with the Rules and Standards

for Law Lists of the American Bar Association.

/s/_____

Robert I. deSherbinin

Sworn to and subscribed
before me this 29th day of
June, 1978.

Opposition

1

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER
CLERK

NO. 81-1135

In The

SUPREME COURT OF THE UNITED STATES

October Term 1981

OMA H. HESTER, JR.,
Petitioner

v.

MARTINDALE-HUBBELL, INC., AMERICAN BAR ASSOCIATION, AND NORTH CAROLINA STATE BAR,
Respondents.

BRIEF OF RESPONDENT AMERICAN BAR ASSOCIATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

David R. Brink
1155 East 60th Street
Chicago, Illinois 60637
President, American Bar Association

John V. Hunter, III
P. O. Drawer 1191
Raleigh, North Carolina 27602
Attorney for American Bar Association

January 15, 1982

QUESTION PRESENTED

1. Whether the Court of Appeals properly upheld the District Court's finding that petitioner failed to set forth specific facts to show a genuine issue for trial on his contention that the challenged Martindale-Hubbell, Inc. rating policy was the result of concerted activity among the respondents within the meaning of Section One of the Sherman Act, 15 U.S.C. §1?

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NO. 81-1135

In The
SUPREME COURT OF THE UNITED STATES
October Term 1981

OMA H. HESTER, JR.,
Petitioner

v.

MARTINDALE-HUBBELL, INC., AMERICAN BAR ASSOCIATION, AND NORTH CAROLINA STATE BAR,
Respondents.

BRIEF OF RESPONDENT AMERICAN BAR ASSOCIATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

This case presents the question of whether the Court of Appeals properly upheld the decision of the District Court that petitioner failed to adduce specific facts to show a genuine issue for trial on his allegation that the challenged rating policy of respondent Martindale-Hubbell, Inc. ("Martindale") was the result of concerted action among respondents within the meaning of Section One of the Sherman Act, 15 U.S.C. §1.[1]

[1]The facts of record presented in the Statement of the Case are reported in the decisions below: *Hester* v. *Martindale-Hubbell, Inc.*, 493 F. Supp. 335, 336-7 (E.D.N.C. 1980); and *Hester* v. *Martindale-Hubbell, Inc.*, 659 F.2d 433, 433-435 (4th Cir. 1981). Both of these decisions are reproduced in the appendix to petitioner's brief (cited herein as A___) respectively at A79-81 and A113-124.

In this action petitioner Oma H. Hester ("Hester"), an attorney practicing in North Carolina, challenges the policy of respondent Martindale concerning the publication of "professional cards" in its Law Directory. The Martindale Directory is a general legal directory comprised of two sections, the geographical section and the biographical section. Martindale has a policy of requiring that all subscribers to its biographical section have a rating according to its rating system. Because petitioner Hester did not have a rating, Martindale applied this policy and refused his request in August, 1973 for publication of his professional card in its 1974 Law Directory.

Hester proceeded to file the instant action, which alleges, insofar as it pertains to respondent American Bar Association ("ABA"), that Martindale, the ABA, and respondent The North Carolina State Bar ("State Bar") acted concertedly to exclude him from advertising in the biographical section of the Martindale Law Directory in violation of Section One of the Sherman Act. Hester contends that respondents ABA and State Bar combined with Martindale to exclude him through a State Bar rule promulgated by the Supreme Court of North Carolina governing conduct of attorneys in that state: DR 2-102(A)(6) of the North Carolina Code of Professional Responsibility ("North Carolina Code").

At the time of Hester's complaint in 1976, DR 2-102(A)(6) of the North Carolina Code provided that an attorney could publish biographical and other specified information in a reputable law list and further stated:

> "A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards . . . "

At the time, this rule was substantially identical to a provision in the ABA Model Code of Professional Responsibility. The ABA Model Code is not binding on any lawyer. As its name implies, it is simply a model which state Supreme Courts may choose to follow in promulgating rules governing the practice of law within their jurisdictions. The ABA has never attempted to enforce or secure adherence in any manner to its Model Code, and petitioner never adduced any evidence to the contrary.

Following revisions to the corresponding provision of the ABA Model Code in 1977, DR 2-102(A)(6) of the North Carolina Code was amended by the North Carolina Supreme Court in 1978 to delete reference to certification by the ABA. Thus, the only reference now to the reputability of a law list under the North Carolina Code is the statement that "[a] law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession." DR 2-102(A)(5).

Before 1978 the ABA had a Standing Committee on Law Lists, which formulated voluntary standards for law list publishers. In February, 1978, this Committee was discontinued, and the ABA no longer undertakes to certify law lists. Even before discontinuation of the Committee, however, the North Carolina Code never required a law list publisher to obtain ABA approval, nor did it prohibit lawyers from advertising in law lists not approved by the ABA. Moreover, the ABA never required any law list publisher to adopt, maintain, or utilize a rating system as a condition to certification. Thus, the rating system utilized by Martindale was extraneous to the ABA's voluntary certification program. Martindale submitted its Law Directory to the Committee and received a certificate of compliance from the Committee. In 1977, Martindale was one of sixty law lists so certified.

Hester alleges that by approving Martindale's Law Directory as a reputable law list, the ABA and the State Bar pursuant to DR 2-102(A)(6) in effect "sanctioned" Martindale's determina-

tion not to publish Hester's professional card and thereby combined with Martindale in violation of Section One of the Sherman Act. After completion of two years of extensive discovery by Hester on these allegations including interrogatories, requests for admission, and requests for production of documents, Martindale and State Bar moved for summary judgment based on the pleadings the record, and the accompanying affidavits of Mr. William Hildebrand, Jr., Senior Vice-President of Martindale, and Mr. Robert I. de Sherbinin, Vice-President of Martindale. Hester responded relying primarily on the pleadings unsupported by rebuttal affidavits.[2] On May 29, 1980, the District Court granted the pending motions for summary judgment, specifically finding that there was no genuine issue for trial on petitioner's allegation of concerted action among the respondents. Having determined that there was no probative evidence of concerted action, the District Court also dismissed petitioner's claims against ABA. (493 F.Supp. 335, A75).

On appeal, the United States Court of Appeals for the Fourth Circuit upheld the District Court's dismissal of Hester's claims. (659 F.2d 433, A112). The Court found that "the requisite concerted activity [for proof of a Sherman Act Section One violation] was not established on the record presented." (659 F.2d at 436, A126). In reaching this conclusion, that Court held that even

[2]In his brief in response to the summary judgment motions of respondents, petitioner relied on three "facts" in addition to the pleadings to support his allegation of concerted action: (1) for thirty years prior to 1974, the ABA provided its membership list to Martindale free of charge; (2) Martindale provided the ABA with free copies of its Law Directory; and (3) ABA members were so designated in the Law Directory. (493 F. Supp. at 338, A89). The District Court rejected these facts as irrelevant to petitioner's allegation of concerted action, holding:

> "The composite of the ABA's alleged conspiratorial acts, i.e., receipt of a complimentary copy of the Directory, providing the association's membership list to Martindale, finding that Martindale's refusal to publish plaintiff's professional card did not violate the Code of Professional Responsibility and certifying the Directory as reputable, is wholly disassociated with the advertising restrictions alleged to have caused Hester injury." (493 F. Supp. at 339, A93-94).

reading Hester's proffered proof most favorably to his case, there was no genuine issue for trial on the question of concerted action, an essential prerequisite to proof of a Section One violation:

> "There was no showing on the record, nor was it ever alleged, however, that the ABA required, or even suggested, that Martindale-Hubbell condition the right to advertise in its publication on the attainment of a certain rating, which was the restraint of trade alleged in this case. Thus, at best, Hester's proffered proof established only that the ABA and the State Bar did not prevent Martindale-Hubbell from refusing to publish his advertisement when they arguably had the influence to do so. Such evidence simply does not show a concerted refusal to deal within contemplation of the laws invoked." (659 F.2d at 436, A128-9).

Hester now seeks additional review from the Court.

SUMMARY OF ARGUMENT

This case was decided below on the sole ground that despite extensive discovery efforts, petitioner was unable to adduce facts sufficient to demonstrate a triable question on his allegation of concerted action among respondents. Contrary to petitioner's assertions on brief, the decision below does not conflict, disagree with, or attempt to interpret in any new manner decisions of the Court concerning the requirements of a violation of Section One of the Sherman Act. Instead, it rests squarely on the fact that the challenged rating policy was the unilateral action of Martindale, and that petitioner's conclusory allegations of concerted action involving the ABA and State Bar were wholly unsupported by any probative evidence.

Further, this case does not, as petitioner contends, raise an important issue concerning the antitrust limitations on "professional certification programs." The alleged anticompetitive restraint challenged is the rating policy of Martindale and its application by Martindale to petitioner. No rule or policy of any professional association is alleged to have caused injury to petitioner. For

these reasons, the writ of certiorari sought by petitioner does not meet any of the standards for such review by the Court and should be denied. *See* Rule 17, *Rules of Practice of the Supreme Court of the United States.*

ARGUMENT

I. THE DECISION BELOW WAS PREDICATED ON PETITIONER'S FAILURE TO PROFFER ANY EVIDENCE OF CONCERTED ACTION BY RESPONDENTS AND HENCE PRESENTS NO CONFLICT WHATSOEVER WITH DECISIONS OF THE COURT UNDER SECTION ONE OF THE SHERMAN ACT.

It is settled law that to prove a violation of Section One of the Sherman Act a plaintiff must satisfy at least two prerequisites. First, he must prove that the defendants engaged in some form of concerted activity—*i.e.*, a contract, combination, or conspiracy. *See, e.g., United States* v. *Container Corporation*, 393 U.S. 333, 335 (1969). Second, he must establish that this concerted activity resulted in an *unreasonable* restraint of trade. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

The decision below held that petitioner failed to proffer specific facts to demonstrate a triable issue on the first prerequisite to a Sherman Act violation—concerted action among the respondents. Having so concluded, the court did not purport to decide the further hypothetical question of whether, if there had been concerted action, it would have constituted an unreasonable restraint of trade under the Sherman Act.[3]

The Court of Appeals reached this conclusion entirely on the basis of petitioner's failure to come forward with specific facts to support his allegations of concerted action. The purported Sher-

[3]Petitioner, throughout his brief, seizes upon and makes repeated reference to a statement in the lower court's decision that Martindale's rating policy restrained trade "in the form of restricted access to advertising." (659 F.2d at 436, A125); (Pet. Br., pp.1, 3, and 27). Contrary to petitioner's implication, however, the decision nowhere suggests that this rating policy would necessarily be held to constitute an *unreasonable* restraint of trade under the Sherman Act, even if petitioner had come forward with evidence that this policy was the product of concerted activity among respondents. That issue was, of course, never reached.

man Act restraint alleged by Hester was the application by Martindale of its rating policy to refuse his request for publication of his professional card. It is undisputed that this rating policy was formulated and adopted by Martindale entirely on its own. As the Court of Appeals held, "[t]here was no showing on the record, nor was it ever alleged, however, that the ABA required, *or even suggested*, that Martindale-Hubbell condition the right to advertise in its publication on the attainment of a certain rating, which was the restraint of trade alleged in this case." (659 F.2d at 436, A128); (emphasis supplied). The only allegations pertaining to the ABA were that it established guidelines for approval of law lists and that Martindale voluntarily submitted its directory to the ABA for certification that the directory complied with these guidelines. The ABA played no role in the formulation of Martindale's rating policy, nor in the implementation of that policy as it applied to Hester. Thus, as the Court of Appeals correctly found, "at best" Hester's proffered proof of concerted action arguably indicated only that the ABA and the State Bar did not attempt to use whatever influence they may have had to preclude Martindale from applying its rating policy to Hester. The Court properly held that this alleged proof "lies beyond the pale of even the most liberal extension of the concept of concerted activity." (659 F.2d at 436, A127).

Petitioner's brief to the Court totally ignores the fact that this case was decided below based on the utter insufficiency of factual proof to support his contentions. Instead petitioner makes the contrived argument that the decision was based on "an analysis considerably at variance with this Court's approach in *Albrecht* and *Parke, Davis, supra.*" (Pet. Br., p. 31). The decision of the Court of Appeals, however, nowhere disagrees with or takes issue with the principles enunciated in these cases. The decision below simply and properly holds that *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), is *inapposite* to this case because there it was uncontroverted that an express agreement existed among the defendants and "the question was whether that agreement was inciden-

tal or essential to a restraint of trade."[4] (659 F.2d at 436, A125). In this case, because of petitioner's failure to set forth specific facts to demonstrate a triable issue on his allegations of concerted action among respondents, the Court of Appeals found it unnecessary to consider the hypothetical question whether, if sufficient evidence of an agreement had been forthcoming, the agreement was "incidental or essential to a restraint of trade." *Id.*

The decision below likewise does not directly or impliedly take issue with the Court's holding in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960). There the Court found an express agreement between Parke Davis and its wholesalers based on specific evidence that the wholesalers *agreed* with Parke Davis to cut off retailers who did not abide by the Parke Davis suggested retail price, and further that this arrangement was secured through threats by Parke Davis to terminate wholesalers who did not enter into the agreement. *Id.* at 45. In this case, petitioner has presented no such specific facts.

The decision of the Court of Appeals, therefore, is not in conflict with either *Albrecht* or *Parke Davis*. Both *Albrecht* and *Parke Davis* involved undisputed evidence of joint action among the defendants regarding the challenged activity whereas here the record is devoid of any such evidence.

Petitioner next relies on a series of decisions under the Sherman Act involving rules imposed by trade associations on their members to support his contention that there was concerted action among respondents in this case. (Pet. Br., pp. 37-44). This reliance is equally misplaced. Each of these decisions involves a Sherman Act challenge to a rule formulated by the trade associa-

[4] In *Albrecht* it was clear from the "uncontradicted facts" that The Herald Co. had entered into an agreement with the two other respondents, Milne and Kroner, the former agreeing "to solicit customers away from petitioner [Albrecht] in order to get petitioner to reduce his price," and the latter "to deliver papers at the suggested price" to Albrecht's former customers. 390 U.S. at 150. There was no doubt therefore that the three respondents, Herald, Milne, and Kroner had entered into a direct combination. The Court's analysis focused on whether this conceded agreement was the type the Sherman Act was intended to proscribe.

tion itself and imposed and enforced on its members. Because in each case the rule formulated by the association was agreed to by its members, the requisite collaborative action among the association and its members was clearly present. For example, in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), the rule of an association prohibiting member engineers from submitting "any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services" was held violative of the Sherman Act. *Id.* at 683. Because this rule was formulated by the association and was binding on its members, the Court concluded: "In this case we are presented with an *agreement* among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer." *Id.* at 692. (Emphasis supplied).

Similarly the other cases cited by petitioner involve challenges to rules formulated by the association and binding on its members. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 776 (1975); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 344 (1963); and *Associated Press* v. *United States*, 326 U.S. 1, 16 (1945). In each of these cases, unlike the instant case, the association rule itself was the challenged activity, and hence the existence of concerted action was established by the agreement of the association members to the rule.

This situation, of course, is different from the instant case where the alleged anticompetitive restraint is not a rule of the ABA or the State Bar imposed on their members, but the rating policy of Martindale. Petitioner has not adduced any evidence of the ABA's or State Bar's involvement in the formulation or implementation of that policy in Hester's case. Hence the conclusion that an "agreement" existed in the trade association cases cited and relied on by petitioner presents absolutely no conflict with the basis of the decision below.[5]

[5]The offhand remark in a footnote in the dissent below that because "[t]he ABA is itself a voluntary association of competitors," it "need not join with any other party for its actions to constitute 'concerted activity'

(Footnote continued on next page)

In summary, the decision of the Court below rests on the sole ground that petitioner, despite two years of extensive discovery, has been unable to proffer evidence sufficient to demonstrate a triable issue of fact on the existence of concerted action among respondents. The decision does not directly or impliedly disagree with other decisions of this Court under Section One of the Sherman Act and presents no basis for granting the writ of certiorari sought by petitioner.

II. THE DECISION BELOW DOES NOT PRESENT ANY QUESTION CONCERNING "PROFESSIONAL CERTIFICATION PROGRAMS" OR ANY OTHER NEW OR IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE COURT.

Petitioner next attempts to cast this case as one involving an important issue concerning the appropriate Sherman Act limitations on a trade association's certification programs. (Pet. Br., pp. 44-48). This is not such a case. In the first place, no rule or standard of the ABA is even at issue. Petitioner's complaint pertains solely to the rating policy formulated and implemented by Martindale, and it is undisputed that the ABA did not formulate this policy or participate in any way in Martindale's determination to apply this policy to petitioner. Thus, in contrast to the authority cited by petitioner, *Radiant Burners, Inc.* v. *Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961), this case does not at all involve an antitrust challenge to the reasonableness of any *association* rule or policy (or indeed a "certification program"). Although petitioner alleges in conclusory fashion that the ABA and State Bar somehow "successfully collaborated" with Martindale to restrain trade (Pet. Br., p. 36), petitioner did not come forward

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(Footnote continued from previous page)
within the meaning of the Sherman Act" is plainly wrong. (659 F.2d at 439 fn., A143). Even assuming that this statement might be applicable in cases where a conspiracy exists among association members to restrain competition among themselves, it has no relevance where, as here, the activity challenged is the purely unilateral act of another entity.

with any specific facts supporting these bare allegations, and his action was properly dismissed on that basis.

Moreover, even if petitioner were challenging DR 2-102(A)(6) of the North Carolina Code, which provided that law lists approved by the ABA would be accepted as reputable, that issue would be academic and has been academic since 1978 when DR 2-102(A)(6) was amended to delete any reference to ABA approval and the ABA Standing Committee on Law Lists was discontinued. Thus, even if viewed as a challenge to DR 2-102(A)(6), which it plainly is not, this case does not present an important or recurring issue for resolution by the Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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January 15, 1982

Opposition

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Office - Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1135

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

OMA H. HESTER, JR.,

Petitioner,

v.

MARTINDALE-HUBBELL, INC.;
AMERICAN BAR ASSOCIATION; and
NORTH CAROLINA STATE BAR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS MARTINDALE-HUBBELL, INC. AND NORTH CAROLINA STATE BAR IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED[1]

1. Whether a private publisher's (i.e., Martindale-Hubbell's) unilateral adoption of publication policies, which are in compliance with rules and standards promulgated by a nonprofit association of professionals (the American Bar Association) and adopted by a state through its regulatory agency (North Carolina State Bar) as part of its Code of Professional Responsibility for lawyers, constitutes a conspiracy or concerted action by the publisher, the association and the state agency.

2. Whether in the absence of circumstances amounting to an illegal monopoly or conspiracy a private publisher may unilaterally determine to whom and upon what terms it will sell advertising.

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[1] Respondents take issue with Petitioner's statement of the Questions Presented; Petitioner's questions are inapt and include statements of purported facts which are not found to be facts by either the Court of Appeals or the District Court. For example: (1) Petitioner states in Questions I and III that Martindale-Hubbell's advertising policies were discriminatory. The District Court found that Martindale had adopted a "uniform policy" (Pet. App. 80) and had "applied [its marketing policy] uniformly." (Pet. App. 98) (2) Petitioner asks in Question I about "Martindale's domination of the general legal advertising market." The District Court observed only that Martindale had achieved an "enviable market position," and that Petitioner had "neglected to define the target market." (Pet.App. 102) (3) Petitioner states in Question III that Martindale "enforces a tying arrangement . . . and restriction of its resale market." There are no findings of fact in the record to support this. Petitioner first raised the question of a tying arrangement in his brief to the Court of Appeals. [Even if the question of the existence of a tying arrangement were properly before this Court, that same question was decided in Martindale-Hubbell's favor in *Hirsh* v. *Martindale-Hubbell, Inc.*, 505 F.Supp. 114 (D.Ariz. 1981)]. No question of resale market restrictions has been raised heretofore. Respondents submit that the Questions Presented in the Petition do not apply to the undisputed facts of this case, for the reason that Petitioner's questions assume, or erroneously state, as fact what has been found by the Court below not to be fact. Respondents further submit that the Questions Presented herein, though fully and (we believe) correctly answered by the Court below, are the only questions raised by the undisputed facts.

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BRIEF OF RESPONDENTS MARTINDALE-HUBBELL, INC. AND NORTH CAROLINA STATE BAR IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case virtually incorporates the facts as set forth in the Court of Appeals' majority opinion. (*Compare* Petition at 17-18 and 20-25 *with* Pet.App. 114-124.) Respondents[2] concur with the facts set forth in the majority opinion upon which Petitioner relies, and mention the following additional undisputed facts which Respondents believe may

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[2] As used in this Brief, "Respondents" refers to Respondents Martindale-Hubbell, Inc. and North Carolina State Bar.

be appropriate to a complete understanding of the facts relevant to a determination by this Court.

Petitioner has been listed in the Geographical Section of Martindale's Directory since 1952. (Resp.App. 1a) Martindale-Hubbell (Martindale) makes no charge for its standard basic listing of all attorneys in the Geographical Section. (Resp.App. 7a) Petitioner has no objection to being listed there. (Resp.App. 4a) His dispute is that he wishes also to be listed in the Biographical Section of the Directory.

Martindale's long-standing, uniform policy, which goes back many years before Petitioner began practicing law, has been to publish advertisements (professional cards) for attorneys in the Biographical Section only when the attorney or firm has the required rating under Martindale's rating system. (Resp.App. 3a, 8a) Martindale has employed ratings in its Directory for over 90 years. (Resp.App. 7a) Petitioner's current rating, based solely upon the composite opinions of other lawyers and judges in Petitioner's geographical area, is a "cv," making him presently ineligible for publication of his card except in the Geographical Section. (Resp.App. 2a, 3a) Martindale has invited Petitioner to submit his own references of persons (*i.e.*, lawyers and judges) who might respond to Martindale's rating inquiries about him. He has declined to do so. (Resp.App. 3a, 6a)

Petitioner has brought this lawsuit in an effort to force Martindale to abandon its long-standing policy and to print his professional card in the Biographical Section. Through extensive discovery for more than two years, Petitioner obtained responses to his interrogatories, responses to his requests for admissions, and documents asked for in his request for production of documents from each of the respondents. (Pet.App. 122) Upon this record, the District granted summary judgment and the Court of Appeals affirmed. (Pet.App. 122)

REASONS WHY THE WRIT SHOULD BE DENIED

Both of the questions properly before the Court on this Petition were addressed and decided correctly, in favor of the Respondents, in the Courts below. The Petitioner's attack on those decisions is not well founded.

1. The Allegedly "Conflicting" Decisons Relied Upon By Petitioner Are Inapposite.

(a) *Sherman Act, § 1.* Petitioner cites no case in direct support of his position; he contends only that in the case below, the Court of Appeals "applied an analysis considerably at variance with this court's approach" in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960). (Petition at 31) Respondents disagree; Respondents contend that *Albrecht* and *Parke, Davis* are inapposite, and that the Court below correctly and specifically so found. (Pet.App. 125, as to *Albrecht;* Pet.App. 127-128, as to *Parke, Davis*)

In *Albrecht,* the Court found that the undisputed express agreements among Herald, Milne and Kroner had the effect — and from Herald's standpoint, were for the purpose — of forcing Albrecht to adhere to Herald's price ceiling. Milne and Kroner knew that the publisher, Herald, aimed to coerce Albrecht into lowering his newspaper price by having Milne lure away from Albrecht the customers of Albrecht and direct those customers to Kroner, who then would sell to Albrecht's customers at Herald's lower price.

In several important aspects, *Albrecht* differs from the instant case. First, Herald had express agreements with Milne and Kroner that resulted in Albrecht's lowering his newspaper price to the publisher's price. In the instant case, there was no agreement, express or implied, between Martindale and the American Bar Association (ABA) and/or North Carolina State Bar (State Bar) to "fix" Petitioner's rating or to do anything —

as Herald did in fixing its price — either for the purpose or with the effect of prohibiting Petitioner from advertising in the Biographical Section. To the contrary, Martindale invited Hester to submit names of persons (*i.e.*, lawyers and judges) who knew him, which he declined to do. Indeed, Martindale would benefit from having Petitioner's business.

Second, schemes of resale price fixing, like Herald's, have long been held by this Court to constitute per se violations of Section 1. *See Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). No such violation exists in this case. To the contrary, "mere announcement" of Martindale's advertising policy and the "simple refusal to deal," without more, is present here. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

Parke, Davis, supra, involved a drug manufacturer's enforcement of its retail price maintenance program against wholesalers and retailers of its products. The manufacturer refused to deal with retailers (and more importantly with wholesalers selling to retailers) who refused to observe the manufacturer's price schedule. In short, Parke, Davis wielded its refusal to deal with wholesalers as a sword against noncomplying retailers. Such is clearly not Petitioner's case. Martindale has merely refused to deal with Petitioner (that is, has refused to accept Petitioner's subscription for a professional card in the Biographical Section) so long as his rating does not qualify him for a professional card in the Biographical Section under Martindale's established policy. Martindale has not refused to deal with others or taken any other action to keep Petitioner from achieving a rating that would qualify him for the placement of a professional card in the Biographical Section, under Martindale's uniform policy.

Likewise, the other cases cited by Petitioner in support of his Section 1 arguments do not apply to the facts of this case. *United States* v. *Container Corp.*, 393 U.S. 333 (1969) and

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) concern price-fixing arrangements among competitors who in each case belonged to the same trade. Those arrangements inured to the mutual financial benefit of the participants and to the detriment of consumers, faced with fixed prices.

No such arrangement analogous to price fixing exists in Petitioner's case. Neither the ABA, the State Bar nor Martindale reap a "benefit" from an attorney's exclusion from the Biographical Section. In fact, the inclusion of Petitioner's professional card in the Biographical Section would increase Martindale's income. On the other hand, consumers or users of the Directory benefit from Martindale's rating system insofar as they find it reliable and of assistance to them. Of course, as set out in the undisputed facts, the Directory does not purport to include the ratings of all attorneys: some because Martindale has not received sufficient rating information about them, and some because the attorneys have asked that their rating not be published. (Resp.App. 9a)

The trade association cases cited in the Petition do not avail Petitioner. The point of these cases urged by Petitioner is that an unlawful combination or conspiracy might be found in an association's internal regulations, such as canons of ethics. But in this case, Petitioner has alleged and attempted to prove only a combination or conspiracy among the ABA, the State Bar and Martindale, not an internal conspiracy within the ABA or the State Bar.

(b) *Sherman Act, § 2*. Petitioner erroneously states that the District Court concluded that "Martindale had an innocent monopoly." Petitioner then contends, on the basis of that erroneous statement, that the decision below conflicts with holdings of this Court. As a matter of fact the District Court did not conclude that Martindale had a monopoly of any sort. (Pet.App. 99-103) Rather, the Court found: "no evidence of an

intent to monopolize within the meaning of the Sherman Act. . . ." (Pet.App. 103) and that Hester "has not only neglected to define the target market, but he has totally failed to allege any unlawful actions which defendant Martindale has taken to achieve its enviable market position." (Pet.App. 102) Giving Hester the benefit of every doubt and assuming that Martindale's Directory "is the most prominent and widely-recognized listing of attorneys, the court finds no evidence that this market position was unlawfully attained or has been unlawfully maintained by defendant Martindale." (Pet.App. 101-02)

Stated differently the District Court found no evidence of monopoly power in a market demonstrated by Petitioner to be the relevant market, and the Court of Appeals unanimously concurred in this finding. *See generally United States* v. *Grinnell Corporation,* 384 U.S. 563 (1966). Petitioner thus erroneously urges this Court to find the existence of a monopoly where two courts below have not. The fact is that the ABA's rules and standards for certification were equally applicable to all lists. These rules did not preclude lists in which all lawyers were listed nor did they preclude a wide variety of selective lists. According to the evidence, some 60 lists were published, of which the Martindale Directory was only one. The fact that the ABA designated Martindale's Directory as a "general legal directory," listing it in the ABA roster as the only such directory, is not evidence that the ABA applied its rules any differently to Martindale's directory, or that Martindale had a monopoly in the law list and directory publishing industry.

(c) *N.C.Gen.Stat. § 75-1.1.* Petitioner contends that the decision below conflicts with holdings of this Court with respect to the Federal Trade Commission Act, and of the North Carolina Supreme Court with respect to North Carolina's unfair trade practice act. Such is not the case, for the reason that the alleged conflict is based on Petitioner's inaccurate restatement of the holding of the Court below, and on Petitioner's mis-

perception of his evidence and of the allegations contained in his Complaint.

In the Complaint, Petitioner alleges in his fourth count that "Martindale-Hubbell, Inc. and American Bar Association, jointly and severally, and in combination, conspiracy, contract, or concert with each other" committed unfair trade practices. This same count incorporates all of the allegations relating to the Section 1 violation. The Complaint does not allege any violation of N.C.Gen.Stat. § 75-1.1 other than a combination or conspiracy to violate that act; nor has the Petitioner offered evidence of any other acts which either this Court or the North Carolina Supreme Court has found to be unfair or deceptive practices.

The District Court, as affirmed by the Court of Appeals, concluded correctly that: "(1) there is no evidence of a conspiracy between defendants, and (2) Martindale-Hubbell has acted within its unilateral right to establish uniform publication policies. . . ." (Pet.App. 104-05) In so finding, the Courts below have eliminated as possible grounds for finding a violation of N.C.Gen.Stat. § 75-1.1 the only allegations that Petitioner has contended support such a violation.[3] Petitioner should not now be heard to complain about facts and allegations not properly before the courts below.

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[3] In footnote 1 of Chief Judge Winter's concurring and dissenting opinion, Judge Winter made clear that his dissent related only to Sherman Act § 1 and N.C.Gen.Stat. § 75-1. Judge Winter's footnote reads as follows: "Because N.C.Gen.Stat. § 75-1 is the state equivalent of Sherman Act § 1, I would reverse the dismissal of Hester's claim under that section as well. I concur in the majority's decision to affirm summary judgment for defendants with regard to Hester's other claims." Presumably Judge Winter concurs in the majority's decision to affirm summary judgment as to Petitioner's N.C.Gen. Stat. § 75-1.1 claim, which is different from his N.C.Gen.Stat. § 75-1 claim.

2. A Review By This Court Would Involve Only Questions Of Fact, Which Were Fairly Determined Below And Should Not Be Disturbed.

The only question actually raised by Petitioner is whether this Court should reject facts (and inferences from those facts) as found by the District Court and concurred in by the Court of Appeals. Respondents submit that both courts below correctly analyzed all the evidence in the light most favorable to Petitioner, and made findings which were supported by the evidence. As stated by the Court of Appeals:

> Thus, at best, Hester's proffered proof established only that the ABA and the State Bar did not prevent Martindale-Hubbell from refusing to publish his advertisement when they arguably had the influence to do so. Such evidence simply does not show a concerted refusal to deal within contemplation of the laws invoked.

(Pet.App. 129)

Petitioner would have this Court review the facts of this case a third time, and glean from the documents some bit of evidence or inference of conspiracy or unlawful monopoly, which two previous courts have not found.

The Petition asserts as a question "of recurring importance," whether the ABA's certification of a law list publisher's business practices, which practices allegedly restrain trade, constitutes a combination between the ABA and the publisher in violation of the Sherman Act. (Petition at 46) Petitioner's question is not aptly put, but, even if it were, the likelihood of a recurrence of a similar situation in the future is most remote. The ABA terminated its law list certification program in 1978. Petitioner suggests that this question would recur in circumstances involving certification programs of other professional or trade associations. While that may be conceivable, the possibility is remote, and if that should occur, the facts of that case — rather than a rule devised to meet the exigencies of any hypothetical situation — should determine the outcome.

Moreover, this is not the case for deciding the question as put by Petitioner: the facts fail to bear out a nexus between the ABA's certification of Martindale's Directory as being in compliance with the ABA's rules and standards (and therefore reputable under the North Carolina Code of Professional Responsibility)[4] and Martindale's refusal to print Petitioner's professional card. The undisputed fact is that Martindale developed and employed a rating system for about fifty years before the ABA Standing Committee on Law Lists was formed. (Resp.App. 7a, 11a) No record evidence even suggests that the ABA, in adopting its rules and standards on rating systems, did anything more than adopt guidelines deemed appropriate by the ABA (for application to all law lists and directories) to assure that advertising by lawyers would be consistent with the then current ethical standards of the profession. Understandably, those guidelines included many practices which had been established by various law list publishers long before the guidelines were adopted. Each publisher quite properly established its own policies, and most of them chose to publish lists which, in one manner or another, selected the attorneys and firms whose names would be included. For example, some listed only probate counsel, some only insurance counsel, some only lawyers in a defined geographical area, some only a limited number of lawyers in each city or state. Martindale chose to publish a combination of two lists in one directory: in its Geographical Section it undertook to list without charge all attorneys in the United States and Canada; the entry for each attorney included his or her name, date of birth, college and law school attended, date of admission to the bar, office address, and in many

[4] On January 24, 1978, the Chief Justice of the North Carolina Supreme Court approved an amendment to DR 2-102(A)(6) of the North Carolina Code of Professional Responsibility, as adopted by the Council of the North Carolina State Bar. In pertinent part, this amendment deleted the portion of DR 2-102(A)(6) that provided for reputability to be established upon certification by the ABA of a law list or directory as being in compliance with the ABA's rules and standards.

instances the rating of the attorney. (Also, beginning with the 1978 Edition it was not necessary for an attorney to have a rating to enter a subscription for an advertisement ["professional representation"] in the Geographical Section so as to include such additional information as cable address, telephone and telex number, names of partners and associates, fields of law in which the lawyer or firm concentrates, specialties of practice, and names of up to ten clients.) In its Biographical Section, Martindale published the professional cards of attorneys and firms with an "av" or "bv" rating under Martindale's rating system, who entered subscriptions for such cards. (Pet.App. 80-82)

It is difficult to conceive how Martindale's long-standing policies — which it, and it alone developed and long pursued, to the point that its directory came to enjoy a reputation as being preeminent among some 60 law directories in the United States, and to which one may turn for information about practically every lawyer in the nation — could lead to a judicial determination that the very success of its policies and the prominence it has achieved as a law directory publisher, renders Martindale no longer free to conduct its business under the same law as others — and to unilaterally choose those with whom it will conduct business — but must be singled out, among all law list publishers, as a publisher required by law to open its advertising pages (professional cards) in its Biographical Section to all lawyers, whether or not they qualify under Martindale's policies.

It is equally difficult to conceive how Martindale's publication of a law directory which complied with rules and standards established by the ABA for certification of all law directories, and which being certified by the ABA was recognized as "reputable" by the State Bar (thereby qualifying as a directory in which a lawyer might ethically advertise), constituted a combination or conspiracy among Martindale, the ABA and the State Bar.

Of course, neither the District Court nor the Court of Appeals so concluded. Respondents respectfully submit that the District Court was correct in granting summary judgment for Respondents and the Court of Appeals was correct in affirming.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

AFFIDAVIT OF WILLIAM HILDEBRAND, JR.

WILLIAM HILDEBRAND, JR., being first duly sworn, deposes and says that he is a Senior Vice-President of Martindale-Hubbell, Inc., that he is personally familiar with the plaintiff's application to have a professional card published in the Biographical Section of the Martindale-Hubbell Directory and the reasons why said application was not granted; and that he is also personally familiar with the developments which led up to the publication in the 1977 and 1978 Editions of a professional card for the plaintiff in the Geographical Section of said Directory; that the true facts relative thereto are as follows:

1. Our records disclose that the listings of Mr. Hester in our Directory, which were published without charge prior to the 1977 Edition, have been as follows:

> "Initially inserted in the 1952 Edition at Seattle, Washington; listing transferred in 1954 Edition to High Point, North Carolina; star symbol (meaning military service) added in 1955 Edition; 1960 Edition listing transferred back to Seattle without star; 1961 Edition listing continued in Seattle with star added; 1964 Edition omitted — mail addressed to him at Seattle to verify status returned unclaimed; reinserted in 1971 Edition at Hickory with star; 1973 Edition star deleted; 1974, 1975 Editions read:
>
> > Hester, Oma H., Jr., '25'50 c. 575 L. 477 J.D. 1st Citizens Bk. & Tr. Bldg.' "

These numbers indicate that Mr. Hester was born in 1925 and was admitted to the Bar 1950; U.N.C. undergraduate school; graduated from University of Michigan Law School with a degree of LL.B. later reissued as Juris Doctor; maintained his law office in First Citizens Bank and Trust Building; 1976 Edition listing was unchanged except to show law office address to be Medical Arts Building. The triangle preceding Mr. Hester's name denotes that he is a member of the American Bar Association.

2. On October 21, 1972, Mr. Hester advised us by letter of his retirement from the Air Force and his opening of a law office in Hickory, North Carolina, and he expressed an interest in having his

professional card published in our Directory. He was subsequently advised that it was too late to consider his application for the 1973 Edition but that he would be contacted in 1973 by one of our field representatives. By letter of August 11, 1973, Mr. Hester again expressed his interest in having his professional card published in the 1974 Edition.

3. Following a telephone conversation with Mr. Hester on August 29, 1973, I immediately issued instructions to our Rating Department to reopen the file that had resulted from the investigation that had been made of him earlier in 1973. In that earlier effort inquiries were sent to 15 sources, i.e., other lawyers and judges, in Hickory but the resulting file did not contain the necessary endorsements to support a particular rating. Pursuant to my "reopen" instructions, inquiries were sent to 10 more likely sources in Hickory. Since the combined first and second set of inquiries did not produce the necessary endorsements to support any of the three eligibility ratings, we were not able to act favorably on Mr. Hester's application. Had the file supported at least the "cv" rating, we would have been pleased to have accepted a subscription that included a card in the Geographical Section, as we did for the 1977 Edition (See Pars. 7-14 below).

4. On December 7, 1973, I called Mr. Hester and expressed regret that to date the file that had been developed did not contain the necessary endorsements to support an eligibility rating for him and, therefore, we could not act favorably on his application to publish a professional card. I then went on to say that most of the individuals who responded to our inquiries did so in a manner to indicate that they did not know him well enough professionally to express an opinion as to what rating, if any, he should have, and I stated that that was not surprising in view of the relatively short time he had been practicing in Hickory after leaving military service. He nevertheless felt it was within our power to extend him a rating, and I then went over the procedures again emphasizing that it appeared he was in the process of building a professional image in Hickory, but that had not as yet occurred. He then asked if I was telling him that we would not accept a card because it was too late, or because he did not comply with our "subjective" requirements for a card. I responded by saying that the

requirements were not "subjective" and again repeated what the eligibility requirements were. In closing, I told him that we would again be pleased to make another investigation of him next (1974) year to which he could contribute by submitting references, i.e. the names of lawyers and judges with whom he had had professional relations. This conversation was confirmed by my letter of December 10, 1973, (Complaint, Exhibit H and *Attachment #1*) and by Mr. Hester's letter of December 7, 1973 (*Attachment #2*).

5. The confidential rating inquiries which were conducted during 1974 and 1975, did not develop the necessary recommendations to support a rating for Mr. Hester, which again seemed due mainly to the fact that he was still not sufficiently known by fellow members of the bar and members of the judiciary in his area.

6. By letter dated October 14, 1974, (Complaint Exhibit L and *Attachment #3*) a copy of which was sent to Martindale-Hubbell, Inc., Mr. Hester was advised also by the American Bar Association's Standing Committee on Law Lists that he could submit his own references to the publisher, but to date no references have been furnished by Mr. Hester to Martindale-Hubbell, Inc.

7. In 1976 we undertook investigation of a number of lawyers practicing in Hickory and other places in Catawba County and Mr. Hester's name was included among this group. The file that resulted for him contained the necessary endorsements to support the "cv" rating, which while not meeting our eligibility requirements for a card in the Biographical Section (for which the "av" or "bv" rating is necessary) did establish his eligibility for a card in the Geographical Section.

8. I wrote Mr. Hester under date of September 24, 1976 (*Attachment #4*) informing him that:

> "Responses to these inquiries as they relate to you indicate that you are becoming better known professionally and we have now received sufficient endorsements to support the publication of the "cv" rating for you in our next edition."

and informing him that with the "cv" rating he could enter a subscription that would include a card in the Geographical Section and offering him the opportunity to arrange for such a subscription.

9. Before he received that letter, he telephoned Mr. William F. Womble of Womble, Carlyle, Sandridge & Rice, Winston-Salem, our North Carolina Counsel, on September 23, 1976 and supplemented that conversation with his letter of 10/5/76 to Mr. Womble *(Attachment #5)* pointing out to Mr. Womble that he was interested in a card in the Biographical Section, not in the Geographical Section. He brought that letter to a close by saying:

> "I respectfully ask that your client provide to me the necessary information, forms and proposed subscription contract for a listing in the Martindale-Hubbell Law Directory which would include a professional card in the *biographical* section." (underlining his)

10. Mr. Womble forwarded a copy of Mr. Hester's letter of 10/5/76 to us to which I replied under date of 10/20/76 (Attachment #6). I again explained to him our professional card eligibility requirements, reiterated our investigations procedures, told him that we would make further inquiries again next year, and again invited him to submit the names of lawyers and judges with whom he felt that he had had sufficient professional relations to enable them to express an opinion as to the proper rating for him. I closed that letter by informing him that if he was interested in entering a subscription of the type for which he was presently eligible (a card in the Geographical Section) we must be informed thereof not later than November 5th.

11. Under date of 11/2/76 (*Attachment #7*) Mr. Hester responded to our letters of September 24th and October 20th and submitted his signed contract for a subscription to the 1977 Edition, along with the copy to be published in the professional card, which was included for him in the Geographical Section at Hickory in the then current (1977) edition.

12. Under date of 11/5/76 (*Attachment #8*) I acknowledged his subscription and informed him if he wished to revise his material in any manner, such instructions must be in our hands not later than December 5th.

13. Mr. Hester wrote us again under date of 11/29/76 (*Attachment #9*) which letter reached us on December 5th. In it he stated that:

> "The only comment which I have regarding the copy of the proposed listing for myself in your law directory, which was enclosed with your letter, is that I do not approve of, nor do I concur with, the determination, assignment, or publication of a rating by Martindale-Hubbell, Inc., for myself or any other lawyer. Therefore, I request that the letters 'CV' be deleted in the listing for myself in your directory."
>
> "However, if it is the policy of Martindale-Hubbell, Inc., to refuse to list an attorney with a professional card in the geographical section of the directory unless a rating appears in the listing, then I elect to have the professional card representation remain even though I am of the opinion that the ratings of lawyers which appear in your directory are discriminatory, unethical, and unlawful. While I will not acquiesce in this practice by Martindale-Hubbell, Inc., I choose to present my arguments against this rating procedure in other and more direct ways."

14. I responded by our letter of 12/15/76 (*Attachment #10*) in which I informed him that:

> "In accordance with your subscription of November 2nd, and your letter of November 29th, we are proceeding with the publication of your professional card in the Geographical Section of the 1977 Edition of the Directory. Under our current policy, ratings are required to appear with cards in the Geographical Section; consequently we regret that we will not be able to comply with your request to delete the rating from the publication of your card in the 1977 Edition."
>
> "Under a policy change recently adopted to be effective beginning with our 1978 Edition, ratings will not be required in order to publish professional cards in the Geographical Section."

15. During the course of 1977 (for the current, 1978 Edition) we conducted another review investigation of Mr. Hester in which our customary inquiry sheets were sent to 38 different sources in the Hickory areas, i.e., lawyers and judges, some of whom had been used in previous investigations. Since Mr. Hester had still not complied with our repeated invitations to submit his own references, all to

whom our inquiries were sent were selected at random from listings in the Directory in that area. The file that resulted from the aforementioned investigation did not contain the necessary endorsements to support some other rating, but it did confirm the "cv."

16. Under date of October 14, 1977 (*Attachment #11*) I wrote Mr. Hester inviting him to enter a renewal subscription to the 1978 Edition that could include the continuation of his informative card in the Geographical Section. I reminded him of the passage in my letter of December 15, 1976 (*Attachment #10*) that in view of the policy that became effective with the 1978 Edition, his card could appear without any rating. He responded under date of October 29, 1977 (*Attachment #12*) submitting his signed subscription contract and the information to be published along with a request that the "cv" rating not be included with his listing. I responded under date of November 11, 1977 (*Attachment #13*) informing him that we would comply with his request and not publish the "cv" and again inviting him to submit references that we could use in another review investigation to be conducted of him for the 1979 Edition. Up to the present date Mr. Hester has still not responded to our repeated invitations to submit references.

/s/ WILLIAM HILDEBRAND, JR.
William Hildebrand, Jr.

Sworn to and subscribed before a notary public on the 29th day of June, 1978.

APPENDIX B

AFFIDAVIT OF ROBERT I. DE SHERBININ

Robert I. de Sherbinin being first duly sworn, deposes and says that he is a Vice President of Martindale-Hubbell, Inc., and for 12 years prior to January 1, 1977 had been the Manager of the Rating Department; that he is thoroughly familiar with the company's Directory and its rating system; and that the following facts are true to the best of his knowledge and belief:

1. The Martindale-Hubbell Law Directory and its predecessors (Hubbell's Legal Directory and Martindale's American Law Directory) have been published since 1868-1870. For the United States and Canada, in the Geographical Section, we undertake to list without charge or other obligation the name of every lawyer, law firm and professional corporation. In addition to the lawyer's name, the individual alphabetical listings include certain other data, i.e., year of birth and admission to the bar, college and law school attended, address, firm connection or corporate or government employment. Ratings, which have appeared in the Directory for 90 years, are also included with a large number of the individual and firm listings.

2. It is the aim of Martindale-Hubbell to publish ratings for as many lawyers as possible, subscribers and nonsubscribers alike. Our Foreword states:

> "While we are continually making rating investigations in accordance with our regular revision procedures, an initial or review investigation of any lawyer will be made at his or her request."

3. In addition, an investigation is made of a lawyer when a request therefor is received from a partner or some other person. The total number of investigations for the last five editions was in excess of 400,000. If a lawyer requests the omission of his or her name or that no rating appear, such request is honored.

4. Those to whom our confidential inquiries are directed, i.e., other lawyers and members of the judiciary, are requested to make their recommendations on the basis of the standard of ability for the place or area where the lawyer practices taking into consideration

age [1], practical experience [1], nature and length of practice and other relevant qualifications. Martindale does not undertake to make an evaluation of a lawyer's scholastic background, type of clients represented, the number and kinds of cases handled or participation in professional or community activities. The lawyers contacted are not limited to the more senior members of the bar who understandably might be out of touch with their younger colleagues. The rating inquiry forms are designed to elicit recommendations based on personal knowledge of the professional standing of the lawyer under inquiry. If a reporting source does not know enough professionally about a lawyer, space is provided to so indicate. The number of reports obtained varies with the size of the bar from 8 to 12 in smaller towns, up to 100 or more in very large cities.

5. Investigations are not conducted in law partnerships or professional corporations. The rating to be extended to such an entity depends on the lawyer composition thereof and the ratings to be published for those individuals on the basis of investigation made of them.

6. Ten years' admission was the minimum required for the legal ability rating of "a" (very high) and five years for the "b" (high). The "c" (fair) rating could have been established after three years. Unless the "v" (very high) for general recommendations (which embraced faithful adherence to ethical standards, professional reliability and diligence, and other relevant factors) is established, no rating to any category is published.

Note: As of January 1, 1978 minimum periods of admission for the legal ability ratings were discontinued. All investigations made subsequent to that date focused reporting sources attention on this policy change.

7. A lawyer whose practice is limited to a particular field or fields of law or who feels that for some other reason our normal procedures will not develop a file which would support the rating that

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[1] Age and practical experience were eliminated as of January 1, 1978 as factors that reporting sources should take into account. See also note following paragraph #6.

he or she feels should be extended may submit the names of lawyers and judges with whom he or she has had sufficient professional relations to enable them to express an opinion as to the proper rating. Inquiries are then directed to substantially all of these sources as well as to others of our own selection.

8. While our field representatives, as part of their regular work, make oral, on-the-spot confidential inquiries, no rating is established, advanced, lowered or withdrawn on the basis of a field representative's work. Before any such action is taken, an independent, confidential, written investigation is made in which inquiries are directed to some, but not necessarily all, of the persons to whom our representative spoke, plus others of our own selection. The rating action reflects the content of the confidential recommendations received.

9. There are many lawyers for whom no ratings are published. This may result from conflicting reports or inability to obtain information because of the size of the bar, or the lawyer's youth, or limited activities which afford little or no opportunity for others to form an opinion. In some instances, as indicated above, no rating appears in compliance with a specific request received from the lawyer. Accordingly, it is not proper to draw unfavorable inferences about a lawyer for whom no rating is published. Therefore, in the confidential key (inside the front covers of Volumes I through V) when the alleged cause of action arose and through the 1977 Edition, it was stated:

> "Absence of rating characters should not be construed as unfavorable as we do not undertake to publish ratings for all lawyers; nor should any unfavorable inference be drawn from the absence of the listing of a lawyer or firm as some are omitted by request while for others the publisher has been unable to secure the basic listing information."

Beginning with the current (1978) edition the aforementioned was revised and expanded to read as follows:

> "Absence of rating characters should not be construed as unfavorable as we do not undertake to publish ratings for all lawyers. Some have requested not to have any rating published

while for others a definitive file has not been developed because of the relatively few years the lawyer has practiced, the size of the bar or for other reasons unrelated to the individual's professional competence.

No unfavorable inference should be drawn from the absence of the listing of a lawyer or firm as some are omitted by request while for others the publisher has been unable to secure the basic listing information."

10. Ratings are not automatically transferred from one place to another within the same jurisdiction nor from one jurisdiction to another.

11. Ratings in the categories of Estimated Worth and Promptness in Paying Bills, which were only published at places having a population of under 34,000, were discontinued effective with the 1973 Edition.

12. We have a separate department of approximately 60 employees (not including our field staff and executives) whose full-time function is conducting investigations. The files developed are evaluated by personnel thoroughly trained for this function. At least one officer or other executive participates in every decision to establish, advance, lower or delete a rating and on those files which are more involved, two or more officers take part.

13. Beginning with the 1978 Edition it is no longer necessary to have a rating in order to enter a subscription providing for professional representation in the Geographical Section. These cards may include, in addition to the name and local address, some or all of the following: cable address; telephone and telex number; names of partners, associates or counsel; fields of law in which the lawyer or firm concentrates; specialties of practice if permitted in that jurisdiction; and the names of not more than ten clients and/or references. Prior to that edition the publication of such information in the Geographical Section required the "cv" or the "av" or "bv" rating.

14. No subscription, however, is solicited or accepted on the promise of the publication of a particular rating nor is preferential consideration extended to those who subscribe.

15. Since the ratings would be of questionable reliability if, when once established, they were not subject to re-examination, it is our policy to conduct periodic review investigations so that we will have the necessary continuing supporting files for the ratings. If the resulting file does not support the published rating, it is lowered or withdrawn in the next edition unless that action is not clearly indicated. In this latter case, the rating is continued with the file being marked for further inquiries to be made the following year. In either of the foregoing situations, a new or renewal subscription that would include a biographical card would not be solicited or if already received, the order is cancelled.

16. Those who participate in the rating investigations receive no payment therefor.

17. It has always been our policy to treat as absolutely confidential all phases of our investigations and not to disclose the particular sources used or the information developed; those to whom our inquiries are directed participate with that understanding. Were this not so, we would never have gained the respect and confidence of the sources upon whom we draw for information and who participate so frankly and so unreservedly in our investigations.

18. [1]When the Law Lists Committee of the American Bar Association first came into being in the late 1930's, it adopted Rules and Standards as to Law Lists. These were approved by the House of Delegates of the ABA and have been couched in substantially the same language since June, 1944.

Rule and Standard 4 reads:

> "The Publisher of a law list which has received a Certificate of Compliance from the Committee may rate its listees in a manner not disapproved of by the Committee."

---

[1]The functions of the Law Lists Committee were in a state of great uncertainty after August, 1977 when amendments to the Code of Professional Responsibility eliminated DR 2-102(A)(6). This uncertainty ended on February 10, 1978 when the Board of Governors rescinded the authority of the Law Lists Committee to issue to law lists and legal directories, as it had done for about forty years, Certificates of Compliance with the Rules and Standards as to Law Lists.

In the implementation of this Rule and Standard, the Committee promulgated the following Rulings:

> "1. A publisher who rates lawyers must base the rating of ability upon a careful, adequate and thorough investigation reasonably and impartially made.
>
> "2. A publisher may not adopt a system of rating lawyers, unless that system has been submitted to, and approved by, the Committee.
>
> "3. A publisher may not change the system used in rating lawyers, unless the proposed change has been submitted to, and approved by, the Committee.
>
> "4. An attorney may properly answer questions by a law list publisher as to the proper rating of other lawyers.
>
> "5. A lawyer may give data to a law list to enable it to rate him."

19. The Law Lists Committee had been provided with a full explanation of our eligibility requirements to publish professional cards and of our rating system. In addition, members of the Committee had visited our premises and without violating our policy of confidentiality made on-the-spot inspections of the operation of the rating system which has been approved by the Law Lists Committee. Like information and inspection opportunities will be provided to any duly authorized bar association official or committee.

20. The Law Lists Committee released each year a roster of law lists and legal directories the publishers of which had received certificates of compliance for their editions to be published in the following year. This roster was published annually in the *American Bar Association Journal* as well as in other bar association publications. A copy of the roster as it appeared in the January, 1977 issue of said *Journal* is attached hereto.

21. For many years the Law Lists Committee had issued certificates of compliance for over 60 publications in the following categories: General legal directory, state and regional legal directories, general law lists, commercial law lists, insurance law lists, probate law list, and foreign law lists.

22. Martindale-Hubbell's objective is, and always has been, to publish a directory, in accordance with legal requirements and high ethical standards, which will provide a worthwhile service to those who have occasion to engage legal counsel at places where they do not know who is available to render the services desired. The standards, practices and procedures developed by Martindale-Hubbell over the years with respect to the listing and rating of lawyers have proven effective toward achieving that objective. Martindale-Hubbell does not involve itself in any respect in the selection of such counsel.

23. Martindale-Hubbell has acted on its own, unilaterally, in developing its standards, practices and procedures and in publishing its Directory. It has not acted in combination, conspiracy, or concert nor under any contract, agreement or understanding with the American Bar Association, the North Carolina State Bar, or any other firm, association, organization or corporation. As hereinabove indicated, and as was required of all publishers of law lists and legal directories under the Code of Professional Responsibility adopted by the American Bar Association, the North Carolina State Bar and the Bars of other states, Martindale-Hubbell annually applied for and obtained from the American Bar Association a certificate that in publishing the Martindale-Hubbell Law Directory, it had complied with the Rules and Standards for Law Lists of the American Bar Association.

/s/ ROBERT I. DE SHERBININ
Robert I. de Sherbinin

Sworn to and subscribed before a notary public on the 29th day of June, 1978.